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TABLE OF CONTENTS

It's Been a Privilege:

The Erosion of the Attorney-Client Privilege

By

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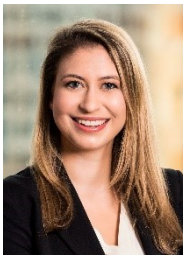

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INTRODUCTION

Across each area of practice in the legal profession, the importance of the attorney-client privilege reigns supreme. Known as one of the "oldest recognized privileges for confidential communications,"[1] the attorney-client privilege encourages open and direct communications between counsel and those who seek their advice.[2] In recent years, however, this important privilege is eroding.

Bad faith cases provide a particularly unique situation for courts to interpret the application of the attorney-client privilege. An insurance company may face a bad faith claim in several circumstances. For example, an insured may make claim against their insurer where an event occurs and the insurance company denies coverage and refuses to pay.[3] Another example is where an insurer refuses to settle a third-party claim within policy limits and an excess judgment is later rendered against the insured.[4] This claim may be assigned to plaintiffs, who can then seek damages against the insurer. How do courts properly resolve the dichotomy between protecting the attorney-client privilege and also allowing the discovery of the reasoning behind the insurer's decision to

determine whether it was justified or, indeed, bad faith?

Courts across the country have developed various approaches for handling these situations. The first is the Restrictive Test, which is utilized by Georgia courts. Under the Restrictive Test, the privilege is only waived where the party that possesses the privileged communication puts the attorney advice directly at issue. This would most commonly be seen where the advice of counsel is raised as a defense in a bad faith claim.

The most commonly followed approach is Case-by-Case/Primary Purpose Waiver Test. In this situation, the privilege is waived where the material is both relevant to the issues in litigation and is necessary for the opposing party's case.

Finally, some jurisdictions have adopted the Automatic Waiver Rule. Where the Automatic Waiver Rule is applied, the privilege is generally waived when a claim is made that puts communications at issue, such as a declaratory judgment action or bad faith claim. For reasons explained further below, this approach, which is showing recent growth, allows for an unprecedented encroachment into the communications between an attorney and his or her client.

I. THE RESTRICTIVE TEST

The Restrictive Test, which is utilized in Georgia, finds that the attorney-client privilege will only be waived where the party in possession of the privilege materials interjects the advice of counsel as an essential element of a claim or defense.[5] In other words, only direct, express reliance on a privileged communication by a client in making his claim or defense will waive the privilege.[6] This approach avoids the over-inclusiveness of the automatic waiver rule and the uncertainty of the ad hoc, case-by-case approach; however, an opposing party may argue that it denies them access to information or documentation that may provide evidence to support its position.[7]

A. Georgia

Under Georgia law, the application of the attorney-client privilege is narrowly construed, but near absolute, for those communications which it covers.[8] There are very few cases in Georgia state and superior courts which address the application of the attorney-client privilege in the context of bad faith litigation.[9] However, federal cases interpreting Georgia law provide guidance on how this principle is interpreted.

For example, in *Liberty Mutual Fire Insurance Company v. APAC Southeast, Inc.*, Judge Walter E. Johnson of the Northern District of Georgia, Atlanta Division, established a narrow approach to when the attorney-client privilege may be waived in Georgia claims.[10]

There, APAC-Southeast, Inc. ("APAC") was the primary contractor for the Georgia Department of Transportation for a highway construction project.[11] Costello Industries, Inc., APAC's subcontractor, obtained a comprehensive general liability insurance policy that covered APAC as an additional insured.[12] After a fatal accident, Liberty Mutual Fire Insurance Company ("Liberty Mutual") accepted a tender of defense and indemnity and assigned counsel. APAC later mediated with the plaintiffs in the underlying case, settled for approximately $3.85 million, and then demanded that Liberty Mutual tender policy limits of $1,000,000 to indemnify it.[13] Liberty Mutual sought a declaratory judgment that APAC settled the underlying lawsuit without its consent, which terminated its obligation to APAC under the policy.[14] A Motion to Compel for documents withheld or redacted was filed.[15]

With regard to the attorney-client issue, the Court stated that the attorney-client privilege may not be overcome based on a showing of need.[16] Further, in the context of a bad faith claim, "although the entire insurance claims file may be relevant, the party seeking discovery is not entitled to documents protected by the attorney-client privilege."[17]

The Court found that Liberty Mutual did not contend that it relied on the advice of counsel or based its decision on its knowledge of the law in its Answer.[18] Furthermore, it did not place the advice of counsel at issue by basing a claim or defense on it.[19] Rather, in response to deposition questions by the opposing party, Liberty Mutual noted that it relied on the advice of counsel with regard to the subject matter of the claim. Because Liberty Mutual did not use the privilege to assert or prove its claims or defenses, the Court held the attorney-client privilege was not waived.[20]

Subsequent cases, both in the area of bad faith, and otherwise, have demonstrated that Georgia courts are reluctant to waive the attorney-client privilege.[21] In *Federal Deposit Insurance Corporation v. Bryan*, the Court asserted that it was "aware of no case in which the attorney-client privilege has been deemed implicitly waived on grounds of fairness (or because privileged information has been placed 'in issue') where the party claiming the privilege has not injected the issue of advice of counsel or knowledge of the law into the case."[22]

B. Texas

The Supreme Court of Texas confirmed its application of a narrow interpretation of the attorney-client privilege in *Republic Insurance Company v. Davis*. This case involved a bad faith claim for wrongful refusal to settle in a fatality case.[23] Defendant Republic Insurance Company ("Republic") objected to certain Requests for Production of Documents.[24] Arguments were heard before a special master, who recommended that some documents, including attorney-client privileged materials, be produced based on the fact that the communication had occurred in connection with another lawsuit.[25]

After discussing the importance of the attorney-client privilege in promoting effective legal services and administration of justice, the Court held that the privilege is only waived where it is being used as a sword

rather than a shield.[26] In making this determination, there were three factors outlined.[27] First, the party asserting the privilege must be seeking affirmative relief. Second, the privileged information must be not merely relevant, but outcome determinative of the case. Third, disclosure of the privileged material must be the only way that the opposing party can obtain the evidence. Where any of these requirements are not met, the attorney-client privilege will be upheld.[28]

Texas courts have continued to allow expansive application of the attorney-client privilege in bad faith litigation. For example, reservation of rights letters may be protected.[29] Further, an attorney who is acting in other capacities, such as performing tasks of an investigator or adjuster as part of providing legal services is considered to be functioning as an attorney.[30] This varies substantially from some of the more wide-ranging applications seen in other jurisdictions.

II. THE CASE-BY-CASE/PRIMARY PURPOSE WAIVER TEST

In the majority of jurisdictions, whether the attorney-client privilege is waived in bad faith litigation is based on a case-by-case factual analysis that attempts to balance the need for protecting confidential client communications with the need for disclosure.[31] Examples of some states which follow this approach are: Alabama, South Carolina, California, Illinois, Louisiana, Missouri, New Jersey, and Pennsylvania. These cases will often look at the role and actions of the attorney, the arguments raised by both sides in the litigation, and potential import of the information being sought. As noted by the Supreme Court of New Jersey, "[t]here must be a legitimate need of the party to reach the evidence sought to be shielded."[32]

With regard to the role of the attorney, most states hold that when an attorney performs investigative work in the capacity of an insurance claims adjuster,

rather than performing legal work, the privilege will not apply.[33] The relevant question becomes whether the attorney was retained to conduct an investigation or whether the "investigation was related to the rendition of legal services."[34]

The claims, defenses, and other arguments made by the parties will be evaluated in determining whether the attorney-client privilege will protect certain materials. For example, in the Supreme Court of Arizona decision, *State Farm Mutual Auto Insurance Company v. Lee*, a class of insureds brought claims for insurance fraud and bad faith seeking, in discovery, insurer files.[35] State Farm Mutual Auto Insurance Company ("State Farm") denied that it intended to use the defense of reliance on advice of counsel, which would constitute an implied waiver under almost any test.[36] The Court held that the "party that would assert the privilege has not waived unless it has asserted some claim or defense, such as the reasonableness of its evaluation of the law, which necessarily includes the information received from counsel."[37] State Farm claimed that its actions were based on a reasonable and good faith belief that the conduct was permitted by law and a subjective believe based on the legal evaluation and investigation of its claims agents.[38] The Court found that subjective legal knowledge of the claims analysts "necessarily included the advice of counsel as part of the decision-making process" and, thus, the attorney-client privilege was waived.[39]

In June 2019, the Supreme Court of South Carolina adopted the approach outlined in *Lee*. However, it imposed an additional requirement that the party seeking waiver of the attorney-client privilege make a prima facie showing of bad faith.[40] As a small, but important distinction, the Supreme Court of Rhode Island highlighted that the other cannot merely plead bad faith sufficient to waive this privilege. In *Mortgage Guaranty and Title Company v. Cunha*, it

found "the mere fact that plaintiff made a claim for attorneys' fees as part of the claim for damages does not indicate a waiver of the attorney-client privilege."[41]

When evaluating the potential import of the documents, there are certain restrictions which have influenced discoverability. First, the document or information must contain actual legal advice. In Illinois, the courts distinguished between "merely providing legal information and providing legal 'advice.'"[42] *Huntington Chase Condominium Association v. Mid-Century Insurance Company*[43] involved a breach of insurance contract claim arising out of a property damage claim. The Court held that emails, previously withheld based on the attorney-client privilege, must be disclosed as they contained merely factual discussions.[44] The privilege was inapplicable because legal advice or discussion of legal consequence of the factual materials was not provided.[45] The Court noted that the "transfer of insurance claim information between [a party] and its insurer through an attorney does not transform otherwise purely factual data into legal analysis warranting privilege protections."[46]

Further, the attorney-client privileged material being sought generally must be not only relevant, but go to the heart of the issues involved in the case. Where there are non-privileged means for obtaining the same information, the need for disclosure of materials protected by attorney-client privilege is diminished.[47] Instead, the decision of whether an implicit waiver has occurred typically "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." [48]

III. THE AUTOMATIC WAIVER RULE

The approach most destructive to the principles underlying the attorney-client privilege is the Automatic Waiver Rule. In these jurisdictions, when a bad faith claim is

made, the attorney-client privilege is presumptively inapplicable to the pre-litigation claim adjustment and coverage determination process.[49]

A. Washington

The seminal case in Washington that established this principle is *Cedell v. Farmers Insurance Company of Washington*.[50] There, the plaintiff Bruce Cedell ("Cedell") insured his home with Famers Insurance Company of Washington ("Farmers") for twenty years.[51] In November 2006, a fire broke out completely destroying the second story of his home.[52] The fire department determined that the fire was likely accidental and the Farmers' fire investigator agreed there was no evidence of incendiary origin.[53] After eight months of investigation, Farmers offered Cedell a one-time, good for ten days, offer of less than one-third of the estimated exposure.[54] Cedell filed suit for, among other claims, bad faith.[55] Farmers objected to producing more than a heavily-redacted claim file on the basis of privilege.[56]

The Supreme Court of Washington asserted that the insured needed access to the insurer's file to discover facts to support a bad faith claim and that permitting a blanket privilege, merely because lawyers participated in the investigation, would "unreasonably obstruct discovery of meritorious claims and conceal unwarranted practices."[57] A presumption was established that "there is no attorney-client privilege relevant between the insured and the insurer in the claims adjusting process."[58] This presumption can be overcome by demonstrating the attorney was providing counsel to the insurer as to their potential liability, as opposed to engaging in "quasi-fiduciary tasks," such as investigating, evaluating, and processing the claim.[59] At such point, an in-camera review and redaction of mental impressions would occur, absent a showing of an act of bad faith rising to the level of potential civil fraud upon such review.[60]

Cedell remains good law and the guiding standard on this issue in Washington cases.[61] The presumption has been extended to encompass third-party bad faith claims.[62] While this presumption does not subject post-litigation communications or materials to discovery,[63] it has been used to compel the deposition testimony of pre-suit coverage counsel to determine whether the actions of the insurer in denying a tender were reasonable.[64]

B. New York

A recent ruling of the Supreme Court of New York establishes its adherence to the Automatic Waiver Rule, including for the coverage opinions of counsel. In *Otsuka America, Inc. v. Crum & Forster Specialty Insurance Company*,[65] the Court ruled that several communications between Crum & Forster Specialty Insurance Company ("CF") and its attorneys were not privileged and must be produced.

Plaintiff Pharmavite LLC, a wholly owned subsidiary of Plaintiff Otsuka America, Inc. ("Otsuka"), and a manufacturer of dietary supplements, experienced a recall of certain products that resulted in a loss in the amount of $9,000,000.[66] After retaining counsel to conduct an investigation, CF denied coverage.[67] Plaintiffs sued for breach of contract and declaratory judgment.[68]

The parties disputed the discoverability of several documents withheld based on the attorney-client privilege.[69] After conducting an *in-camera* review, the Court issued a decision ordering CF to disclose all of the withheld documents or move to re-argue.[70] CF moved to re-argue and this decision was rendered.[71]

The Court noted that the decision to pay or reject "claims is a part of the regular business of an insurance company."[72] Further, where counsel is acting not as an attorney, but as a claims investigator, communications with the insurer are not privileged.[73] It was asserted that, where attorneys are retained to provide a coverage

opinion, which is an opinion as to whether the insurer should pay or deny a claim, counsel is primarily engaged in claims handling.[74]

There were five categories of documents that CF was required to disclose. First, a memorandum written by a CF representative, which summarized counsel's legal opinion regarding the merits of Otsuka's legal claim.[75] The Court found it was not a communication of primarily legal character as it was not prepared by an attorney, communication between counsel and client, and was "prepared in the ordinary course of an insurance company's investigation to determine whether to accept or reject coverage."[76]

Second, two emails were deemed discoverable. One, from non-party Marsh Risk Insurance to CF, was deemed not primarily or predominantly of legal character.[77] The second, an email from CF to counsel, demonstrated that CF retained the attorneys to act as claims investigators regarding the issue of whether coverage should be accept or rejected and the extent of loss, which is part of the ordinary course of CF's investigation.[78] As with the prior memorandum, the Court highlighted that the fact that counsel was retained did not render these communications privileged.[79] Bolstering this finding was that the correspondences were dated before CF denied Otsuka's claim.[80]

Third, correspondences by email and letter were determined not to be privileged because they were not prepared by attorneys acting as counsel and contained no materials which were "uniquely the product of a lawyer's learning and professional skills."[81] Fourth, communications before the denial of coverage where counsel states its opinion regarding the coverage issue, based on the current state of law and policy language, were deemed discoverable.[82] The Court found them to be part of the regular course of CF's business, which is payment or rejection of claims, and stated they demonstrated counsel was primarily engaged in claims handling.[83]

Finally, the coverage opinion of counsel, which the Court said showed that the attorney was primarily engaged in claims handling, and thus, not protected by privilege.[84] Even a marking of "Privileged and Confidential Attorney Work Product" did not influence this finding as a party's own labels are not determinative.[85] The Court noted, "[e]ven if this memorandum has a mixed multipurpose insofar as it was also composed in anticipation of litigation, it is still discoverable and not privileged."[86]

This ruling, while seemingly a drastic change in the policy and position of courts regarding the attorney-client privilege, is not an outlier. Additional states, such as Indiana, Minnesota, and Montana, have rendered similar opinions regarding the discoverability of communications between an insurer and counsel during a claims or coverage investigation.[87] The import of these decisions is that counsel and an insurer should assume or, at least be aware, that communications prior to a coverage may be discoverable, particularly where counsel is retained to perform the function of an adjuster, and act accordingly.

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[1] *Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S. Ct. 2081, 2084, 141 L. Ed. 2d 379 (1998).
[2] *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981).
[3] O.C.G.A. § 33-4-6; *BayRock Mortg. Corp. v. Chicago Title Ins. Co*., 286 Ga. App. 18, 19, 648 S.E.2d 433, 435 (2007).
[4] *Southern General Insurance Company v. Holt*, 262 Ga. 267, 409 S.E.2d 852 (1991); *Cotton States Mut. Ins. Co. v. Brightman*, 276 Ga. 683, 685, 580 S.E.2d 519, 521 (2003) ("Judged by the standard of the ordinarily prudent insurer, the insurer is negligent in failing to settle if the ordinarily prudent insurer would consider choosing to try the case created an unreasonable risk. The rationale is that the interests of the insurer and insured diverge when a plaintiff offers to settle a claim for the limits of the insurance policy. The insured is interested in protecting itself against an excess judgment; the insurer has less incentive to settle because litigation may result in a verdict below the policy limits or a defense verdict.")
[5] *See Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 864 (3d Cir. 1994); *Remington Arms Co. v. Liberty Mut. Ins. Co*., 142 F.R.D. 408, 414 (D. Del. 1992).
[6] *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 172, 829 S.E.2d 707, 714 (2019)
[7] Restatement (Third) of the Law Governing Lawyers § 80 (2000).
[8] *See Atl. Coast Line R. Co. v. Daugherty,* 111 Ga. App. 144, 149, 141 S.E.2d 112, 116 (1965); *Liberty Mut. Fire Ins. Co. v. Apac-Se., Inc.*, No. 1:07-CV-1516-JEC-WEJ, 2009 WL 10664868, at *3 (N.D. Ga. June 29, 2009).
[9] *Camacho v. Nationwide Mut. Ins. Co*., 287 F.R.D. 688, 692, fn. 3 (N.D. Ga. 2012); *Skinner v. Progressive Mountain Ins. Co.*, No. 1:13-CV-00701-JOF, 2013 WL 12073464, at *5 (N.D. Ga. Nov. 14, 2013) ("No Georgia court has applied the attorney-client privilege in the context of a bad faith failure to settle claim.")
[10] *Liberty Mut. Fire Ins. Co. v. APAC-Se., Inc.*, No. 1:07-CV-1516-JEC, 2008 WL 11320055, at *6 (N.D. Ga. May 16, 2008).
[11] *Id.* at 1.
[12] *Id.*

[13] *Id.* at *2.
[14] *Id.*
[15] *Id.*
[16] *Id.* at *4.
[17] *Id.*
[18] *Id.* at *6.
[19] *Id.*
[20] *Id.*
[21] *Perrigo Co. v. Merial Ltd*., No. 1:15-CV-03674-SCJ, 2017 WL 5203054, at *4 (N.D. Ga. Oct. 5, 2017) (holding that Georgia courts will only find implicit waiver of the attorney-client privilege where a party intends to manipulate the privilege to their advantage and the failure to disclose would necessarily impact fairness and justice, which is limited to the client's position resting on the attorney having done or said something); *Fed. Deposit Ins. Corp. v. Bryan*, No. 1:11-CV-2790-JEC, 2014 WL 11517836, at *3 (N.D. Ga. Feb. 14, 2014) (noting that attorney-client privilege can be impliedly waived, such as a good faith defense based on knowledge of the law supplied by attorney or attorney malpractice).
[22] , No. 1:11-CV-2790-JEC-GGB, 2012 WL 12835873, at *7 (N.D. Ga. Nov. 28, 2012), aff'd, No. 1:11-CV-2790-JEC, 2014 WL 11517836 (N.D. Ga. Feb. 14, 2014).
[23] *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 159 (Tex. 1993)
[24] *Id* at 160.
[25] *Id.*
[26] *Id. at 163.*
[27] *Id.*
[28] *Id.*
[29] *In re Madrid*, 242 S.W.3d 563, 569 (Tex. App. 2007).
[30] *In re Subpoena of Curran*, No. 3:04-MC-039-M, 2004 WL 2099870, at *2 (N.D. Tex. Sept. 20, 2004).
[31] Restatement (Third) of the Law Governing Lawyers § 80 (2000).
[32] *Matter of Kozlov*, 79 N.J. 232, 243, 398 A.2d 882, 887 (1979).
[33] *Argo Sys. FZE v. Liberty Ins. PTE, Ltd*., No. CIV.A. 04-00321-CGB, 2005 WL 1355060, at *3 (S.D. Ala. June 7, 2005)
[34] *Cutrale Citrus Juices USA, Inc. v. Zurich Am. Ins. Grp.*, No. 5:03-CV-420-OC-10GRJ, 2004 WL 5215191, at *3 (M.D. Fla. Sept. 10, 2004) (*quoting Connecticut Indem. Co. v. Carrier Haulers, Inc.*, 197 F.R.D. 564, 572 (W.D.N.C. 2000); *see also Dunn v. State Farm Fire & Cas. Co.,* 927 F.2d 869, 875 (5th Cir. 1991) ("The privilege does not require the communication to contain purely legal analysis or advice to be privileged. Instead, if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged.)"
[35] *State Farm Mut. Auto. Ins. Co. v. Lee*, 199 Ariz. 52, 55, 13 P.3d 1169, 1172 (2000)
[36] *Id.* at 58, 1175.
[37] *Id.* at 62, 1179.
[38] *Id.* at 66, 1183.
[39] *Id.* at 67, 1184.
[40] *In re Mt. Hawley Ins. Co.*, 427 S.C. 159, 177, 829 S.E.2d 707, 717 (2019)
[41] *Mortg. Guar. & Title Co. v. Cunha*, 745 A.2d 156, 160 (R.I. 2000) (noting further that merely because attorney-client communications are relevant does not place them at issue).
[42] Dawson v. New York Life Ins. Co., 901 F. Supp. 1362, 1367 (N.D. Ill. 1995).
[43] *Huntington Chase Condo. Ass'n v. Mid-Century Ins. Co.*, No. 16 C 4877, 2017 WL 440730, at *1 (N.D. Ill. Feb. 1, 2017).
[44] *Id.* at *4.
[45] *Id.*
[46] *Id.*
[47] *Ex parte Dow Corning Alabama, Inc.*, No. 1171118, 2019 WL 6337291, at *4 (Ala. Nov. 27, 2019).
[48] *Vakili v. First Commercial Bank*, No. 2:08-CV-276-VEH, 2009 WL 10670046, at *3 (N.D. Ala. May 21, 2009), aff'd sub nom. *Vakili v. Stephenson*, 478 F. App'x 660 (11th Cir. 2012) (quoting *Ex parte State Farm Fire and Cas. Co.,* 794 So.2d 368, 376 (Ala. 2001)).
[49] *Cedell v. Farmers Ins. Co. of Washington*, 176 Wash. 2d 686, 698–99, 295 P.3d 239, 246 (2013).
[50] *Id.*
[51] *Id.* at 690, 242.
[52] *Id.* at 691, 242.
[53] *Id.*
[54] *Id.* at 691-92, 242.
[55] *Id.* at 692, 242.
[56] *Id.*
[57] *Id.* at 696-97, 245.
[58] *Id.* at 699, 246.
[59] *Id.*
[60] *Id.* at 699-700, 246.
[61] *See e.g., Hoff v. Safeco Ins. Co. of Illinois*, 449 P.3d 667, 675 (Wash. Ct. App. 2019) (applying principles established in *Cedell*); *Canyon Estates Condo. Ass'n v. Atain Specialty Ins. Co.*, No. 2:18-CV-1761-RAJ, 2020 WL 363379, at *1 (W.D. Wash. Jan. 22, 2020).
[62] *See Carolina Cas. Ins. Co. v. Omeros Corp*., No. C12-287RAJ, 2013 WL 1561963, at *3 (W.D. Wash. Apr. 12, 2013) (*quoting St. Paul Fire & Marine Ins. Co. v. Onvia,* 165 Wash.2d 122, 196 P.3d 664, 668 (Wash.2008).
[63] *Richardson v. Gov't Employees Ins. Co*., 200 Wash. App. 705, 716, 403 P.3d 115, 122 (2017) ("*Cedell* does not suggest that privileged or work product information generated postlitigation is also subject to discovery.")

[64] *Everest Indem. Ins. Co. v. QBE Ins. Corp.,* 980 F. Supp. 2d 1273, 1280 (W.D. Wash. 2013)
[65] *Otsuka America, Inc v Crum & Forster Specialty Ins. Co*., No. 650463/2018, 2019 WL 4131024, at *5 (N.Y. Sup. Ct. Aug. 30, 2019)
[66] *Id.* at *1.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at *2 (*quoting Bertalo's Rest. v Exchange Ins. Co.*, 240 AD2d 452, 454-455 (2d Dept. 1997)).
[73] *Id.*
[74] *Id.* (*citing National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v TransCanada Energy USA, Inc.*, 119 AD3d 492, 493 (1st Dept. 2014).
[75] *Id.* at *3.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.* at *4.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id. (citing Bombard v. Amica Mut. Ins. Co.*, 11 A.D.3d 647, 648 (2d Dep't, 2004)(holding that reports prepared by attorneys before coverage decision is made are discoverable even when they are "mixed/multipurpose reports, motivated in part by the potential for litigation.")
[87] *See e.g., Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 671 (S.D. Ind. 1991) (finding no privilege for communications with outside counsel who was hired to monitor progress of the claim, ensure compliance with report requirements, and conduct examination under oath noting that, "[t]o the extent that this attorney acted as a claims adjuster, claims process supervisor, or claim investigation monitor, and not as a legal adviser, the attorney-client privilege would not apply"); *Mission Nat. Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986) (holding that attorney-client privilege does not depend whatsoever on anticipation of litigation, but only on the nature of the relationship involved and whether an attorney is acting as legal counsel or as an ordinary businessman.); *Silva v. Fire Ins. Exch*., 112 F.R.D. 699, 699–700 (D. Mont. 1986) ("The time-worn claims of work product and attorney-client privilege cannot be invoked to the insurance company's benefit where the only issue in the case is whether the company breached its duty of good faith in processing the insured's claim")