Maybank Mayhem:

The emboldened defense Bar takes Maybank v. Sentry Select too far.

by Melissa G. Mosier

Imagine a discovery process where the Defense gets to withhold the recorded statement of a truck driver just hours or days after a crash that seriously injures your client. This statement, by the way, is taken by the insurance adjuster. Imagine that the defense discloses the existence of that statement, but will not produce it or even summarize it, citing the attorney client and work product privilege (again, this is even though the statement is taken by an adjuster). Imagine that, despite denying liability and blaming the Plaintiff, the defense argues that Maybank v. Sentry Select extends the attorney client and work product privilege to insurance adjusters, and therefore argues you never get to determine what the defense's Rule 11 basis is for asserting their comparative and contributory defenses outside of a deposition taken years down the road. This is the position that I have found myself fighting against in a trucking case which is, you guessed it, defended by the insurance company lawyer hired by Sentry Select!

If you find yourself litigating against this, e-mail me or call me and I will gladly send you my brief. But as a primer, let us review the elements of the first of the two privileges Sentry Select is having its lawyers assert on its behalf:

I. A Defendant's statement, secured by an insurance adjuster, meets none of the elements necessary to invoke the attorney-client privilege. In South Carolina the elements of the attorney-client privilege are as follows: (1) Where legal advice of any kind is sought (2) from

a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection can be waived. Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 293, 692 S.E.2d 526, 529–30 (2010) citing State v. Doster (citation omitted).

Counsel for the defendant, whose lawyer is asserting a privilege that purportedly belongs to the insurer who hired him, cannot meet its burden of establishing that a recorded statement of a defendant taken by an insurance adjuster is entitled to the attorney client privilege. In fact, it cannot meet even one element necessary to establish the existence of the attorney client privilege. First, at the most fundamental level, only communications between an attorney and a client could be appropriately considered for this privilege, yet the communication at issue here is between an insured and insurance adjuster. Moreover, while you usually will not get a description of the statement taken by the insurance adjuster, one assumes that it is the customary interview taken in the ordinary course of investigating the insurance claim regarding the facts surrounding the collision and evaluating the potential damages that will be claimed by other parties. Facts concerning a claim and its defenses are not privileged from discovery, and discovery of the claim and its defenses are in fact the entire thrust and purpose of discovery in a civil action.

Further, the Defendant cannot meet its burden of demonstrating that its insured driver communicated to the insurance adjuster for the purpose of receiving or soliciting legal advice. The statement taken hours or days after an incident is necessarily fact-gathering, because before advice can be given, facts must be assessed and witnesses interviewed (except in impeachment proceedings, but I digress). It is expected that the Defendant's statement is truly just that – a factual statement by the Defendant as to what occurred, as one would not expect that an insurance adjuster would open themselves up to the liability associated with the unauthorized practice of law.

In sum, statements taken by adjusters are done in the ordinary course of business of investigating an insurance claim and not to provide legal advice.

II. A Defendant's recorded statement, taken by an insurance adjuster, is not attorney work product and was not taken in anticipation of litigation.

The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party. See Rule 26(b)(3), SCRCP; Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). In determining whether a document has been prepared "in anticipation of litigation," most courts look to whether or not the document was prepared because of the prospect of litigation. Tobaccoville USA, Inc. v. McMaster, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010). The party claiming work product protection from discovery must establish that the motivation behind the preparation of each requested document is the prospect of litigation. Documents and materials which "contemplate[] the potential for litigation" and documents that merely "concern litigation" are not entitled to be withheld on the grounds of work product privilege. Id. at 294-95, 692 S.E.2d 526. It is also not enough that there is a mere possibility of future litigation. Id. Even assuming arguendo the recorded statement of a defendant falls into the category of a "document or tangible thing" that is prepared by an attorney or insurer, the work product doctrine is not implicated here because the document was not created because of the prospect of litigation, but more accurately was taken to get the Defendant's version of the facts concerning the collision and the possible damages claimed by the Plaintiff. Put

the Defendants to their proof, and I bet you will be able to point out that the Defendants have made no showing or offered any reason why the previous statement of a party which is otherwise discoverable given its inherent relevance ought to be concealed from the Plaintiff. I don't know about you, but the harder the defense tries to keep something from me, the more I want it and I am not going to stop until I get it!

The Plaintiff has a substantial need to discover the facts that underly the Defendant's denial of liability and assertion of comparative fault against a Plaintiff. The reliability and usefulness of information provided by a party years after the fact following the initiation of a lawsuit against him can stand in stark contrast with the statement by that same party witness years down the road in litigation unless his previous statement can be used to refresh his recollection. In other words, if an insurance company and its defense lawyers were permitted to conceal the Defendant's initial statement concerning the facts of an alleged incident, there would be no way for the civil justice system to determine whether the later testimony given by the Defendant was similar to or vastly different from the facts gathered by his insurer after the collision. This stacks the deck against those without the resources and sometimes the ability to conduct a timely investigation – in stark contrast, insurance companies sometimes dispatch rapid response teams, beginning their investigations while accident victims lay in hospital beds or their families are being notified of their death. All of this illustrates the perils the Defendants invite should we as the Plaintiff's bar put down our swords and fail to fight against the insurer's desire to broaden the privilege any more than the well-settled law of South Carolina permits.

III. Sentry Select Ins. Co. v. Maybank, Law Firm, LLC, 426 S.C. 154, 826 S.E.2d 270 (2019), does not change the well-settled law concerning attorney-client privilege, and the opinion is silent on the work product doctrine.

By now we all know that Sentry Select spearheaded the recent landmark case holding that an insurance company may pursue a legal malpractice action against a lawyer that represents the insured, in the event that the lawyer's misstep fails to protect the insured and forces the insurer to pay more money for the claim. Id.

The Maybank opinion begins with the following: When an insurer hires an attorney to represent its insured, an attorney-client relationship arises between the attorney and the insured—his client. Pursuant to that relationship, the attorney owes the client—not the insurer—a fiduciary duty. See Spence v. Wingate, 395 S.C. 148, 158-59, 716 S.E.2d 920, 926 (2011) (stating "an attorney-client relationship is, by its very nature, a fiduciary relationship"). Nothing we say in this opinion should be construed as permitting even the slightest intrusion into the sanctity of the attorney-client relationship, nor to diminish to any degree the fiduciary responsibilities the attorney owes his client.

Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 426 S.C. 154, 157, 826 S.E.2d 270, 271 (2019) (emphasis added).

Despite this introduction, Sentry Select insists that the Maybank decision should be construed so as to have changed or broadened the attorney client privilege. The Court made no change to the well-settled law regarding the attorney-client privilege in this state, and even stated, "we emphasize the insurer may not intrude upon the privilege between the attorney it hires and the attorney's client—the insured. We are confident the trial courts of this State are well-equipped to protect the attorney-client privilege according to law if any dispute over it arises. Id. at 160, 826 S.E.2d at 273. In my case the Sentry Select lawyer argues that "an insurer and the insured defendant

are entitled to believe that communications between them relative to a third party claim will be held in confidence and ultimately provided only to defense counsel[]" however there is no legal citation or authority offered for this proposition. To the contrary, the case law of this state makes it clear that such communications are not cloaked with confidentiality, but even if they were, the substantial need of the parties to discover the facts underpinning the claims and defenses overrides such a privilege. It is not enough that the communication between the insured and the insurance adjuster is "consistent with" an attorney-client relationship – it is not a communication between an attorney and a client for the purpose of legal advice or representation. Therefore under the well-settled law regarding the attorney-client privilege, which was left undisturbed by the Court in Maybank, all attempts to broaden the attorney client privilege under Maybank fail as a matter of law.

And finally, the Maybank opinion is completely silent as to the work product privilege, therefore there is no legal basis for any assertion that Maybank extends the work product privilege to communications with insurance adjusters.

Rule 1 of the Federal Rules of Civil Procedure Provides that the Rules "[s]hould be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." It is in furtherance of these ideals that the initial statement made by a party witness gathered in the process of investigating a claim must be made available to an opposing party. To prevent discovery of such evidence invites steps calculated towards self-preservation and the concealment of the truth, and permits the insurer to benefit from concealment of pertinent facts that its insured knew closer in time to the subject event, but has forgotten or otherwise does not recall at the time of his or her later statement to an adverse party years down the road in litigation. My brothers and sisters in the fight, we must rage against the machine - the alternative is to let the truth stay tucked away in a claims file.

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