No. 15-11953

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MAPLEWOOD PARTNERS, L.P., MAPLEWOOD MANAGEMENT, L.P, AND MAPLEWOOD HOLDINGS, LLC,

Appellant,

v.

INDIAN HARBOR INSURANCE COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF *AMICUS CURIAE*, UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS, MAPLEWOOD PARNTERS, L.P., MAPLEWOOD MANAGEMENT, L.P., AND MAPLEWOOD HOLDINGS, LLC

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Pursuant to Local Rule 26.1 of the United States Court of Appeals for the Eleventh Circuit, United Policyholders, Amicus Curiae herein, state that it is a non-profit 501(c) (3) organization, tax-exempt, Corporation organized under the laws of the State of California and funded by donations and grants.

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STATEMENT IDENTIFYING AMICUS, ITS INTEREST IN CASE, AND SOURCE OF AUTHORITY OF AMICUS CURIAE

United Policyholders ("UP"), a non-profit 501(c) (3) organization founded in 1991, is an information resource and a voice for insurance consumers in Florida and throughout the United States. UP assists disaster victims and individual and commercial policyholders with regard to every type of insurance product. Grants, donations and volunteers support our work. UP does not accept funding from insurance companies.

UP's work is divided into three areas: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (disaster preparedness through insurance education), and *Advocacy and Action* (advancing pro-consumer laws and public policy). UP hosts a library of publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

UP has been active in Florida since Hurricane Andrew in 1992. UP works with Florida Insurance Commissioner Kevin McCarty and the Office of Insurance Regulation, other non-profits and individual home and business owners. UP is involved in projects related to property insurance availability, promoting disaster preparedness, mitigation, educating and assisting consumers in navigating claims.

State insurance regulators, academics and journalists throughout the United States routinely seek UP's input on insurance matters. For six consecutive years, UP

has been appointed as an official consumer representative to the National Association of Insurance Commissioners.

UP routinely appears as *amicus curiae* in appeals throughout the United States. UP has appeared as *amicus curiae* in many cases in this Court and the Florida Supreme Court, including: Lemy v. Direct General Finance Com., Case No. 12-14794 (11th Cir. 2014); Amelia Island Company v. Amerisure Ins. Co., Case No. 10-10960G (11th Cir. 2010); Sebo v. American Home Assurance Co., Case No. SC14-897 (Fla. 2014); Washington National Insurance Corp. v. Sydelle Ruderman, et al., Case No. SC12-323 (Fla. 2012); and Amado Trinidad v. Florida Peninsula Ins. Co., Case No. SC11-1643 (Fla. 2012). The undersigned has authored this brief in whole. No party has contributed money to fund this brief and the undersigned has prepared this brief *pro bono*.

In the instant case, UP seeks to appear as *amicus curiae* to address certain issues and questions before the Court that are of significance well beyond the application of law to the specific facts of this litigation. Most importantly, UP submits this brief to reiterate and stress the importance of attorney-client privilege and work-product immunity in the insurance context.

UP requests that this Honorable Court reverse the District Court's judgment and remanded for further proceedings consistent with the Court's opinion.

STATEMENT OF ISSUES

Whether the District Court erred when it ordered MapleWood[1] to produce documents protected by the attorney-client privilege and work-product immunity, and apparently relied on such documents in granting summary judgment for Indian Harbor.

SUMMARY OF ARGUMENT

The District Court has set a dangerous precedent in regards to the discovery and use of documents protected by the attorney-client privilege and work product immunity in insurance coverage cases. If the decision is allowed to stand, communications between an insured and the attorney it hires to advise and represent it, including the attorney's mental impressions, will be subject to discovery and use against the insured by an insurer who has effectively denied coverage. The decision is wrong and it is having a negative impact on other cases in this circuit. See Sun Capital Partners, Inc. v. Twin City Fire Ins. Co., Inc., Case No. 12-cv-81397-KAM (S.D. Fla. July 6, 2015)(order denying objections to discovery order), attached as **Exhibit A.**

[1] "MapleWood" collectively refers to Appellants MapleWood Partners, L.P., MapleWood Management, L.P., and MapleWood Holdings, LLC. "Indian Harbor" refers to Appellee Indian Harbor Insurance Company. "[Doc. __]" refers to the docket entry on the United States District Court of the Southern District of Florida. "District Court" refers to the United States District Court of the Southern District of Florida.

ARGUMENT

I. The District Court Erred in Granting Summary Judgment Based Upon the Production of Documents Protected by Attorney-Client Privilege and Opinion Work Product Immunity.

A. The Joint-Client Exception To Attorney-Client Privilege Does Not Apply In Cases Where An Insurer And Insured Are Adverse To One Another Because The Insurer Has Effectively Denied Coverage.

The attorney-client privilege is the "oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The privilege is intended to encourage complete and candid communication between clients and their attorneys and "recognizes that sound legal advice . . . depends upon the lawyer's being fully informed by the client." Id. at 390. In Florida, communications between a lawyer and a client are "confidential" and, barring exception, not subject to disclosure. See Fla. Stat. § 90.502.

Section 90.502, Florida Statutes, which protects attorney client communications, includes several exceptions to the attorney-client privilege. One exception is the "joint client" exception to attorney-client privilege. See Fla. Stat. § 90.502(4)(e). The exception applies only when an attorney represents two parties "in common" who later are opponents in a civil action. The exception provides:

> (4) There is no lawyer-client privilege under this section when:
>
> * * *
>
> (e) A communication is relevant to a matter of common interest between two or more clients, ... if the communication was made by

> any of them to a lawyer retained or consulted in common when offered in a civil action between the clients....

Id.

An attorney may represent clients jointly, so long as the joint representation does not entail a conflict of interest and the clients request or agree to the joint representation. When an insurer denies coverage, asserts a defense to coverage, or issues a reservation of rights under a Policy, the interests of the insurer and insured are in direct conflict. Univ. of Miami v. Great Am. Assur. Co., 112 So. 3d 504, 507 (Fla. 3d DCA 2013). Under such circumstances, both parties need their own counsel and an attorney generally may not represent both the insurer and the insured. Id.

When an insurer unequivocally accepts its obligations to defend, fund defense liabilities, and provide coverage to an insured under a policy, it may be possible for the insured and the insurer to retain and consult an attorney jointly about a single matter. Florida Rules of Professional Conduct, Rule 4-1.8. However, even in that circumstance, Florida law still provides robust protections for the insured in the event a conflict arises between the insured and the insurer and requires attorneys and courts to protect confidential communications between an attorney and an insured over such matters. Progressive Express Ins. Co. v. Scoma, 975 So. 2d 461, 467 (Fla. 2d DCA 2007).

B. The District Court Erroneously Construed The Joint-Client Exception

The District Court erroneously construed Florida's joint client exception to attorney client privilege when it ordered MapleWood to produce to Indian Harbor communications between MapleWood and the law firm of Akerman Senterfitt. The public record and the court's decision make it clear that MapleWood and Indian Harbor had a conflict of interest and were adverse to one another from the beginning of the matter.

The first action against MapleWood was filed on February 15, 2007. MapleWood notified Indian Harbor on February 19, 2007. See [Doc. 40-2]. The second action against MapleWood was filed on June 19, 2007. See [Doc. 152-1]. MapleWood notified Indian Harbor of this suit on June 21, 2007. See [Doc. 40-3]. Both notifications of the suits were submitted by MapleWood's hired defense counsel, Akerman Senterfitt.

More than four months after the notification of the first suit, on June 20, 2007, Indian Harbor retained Ross, Dixon & Bell, LLP to represent Indian Harbor and deal with MapleWood at arm's length over issues and disputes concerning coverage under MapleWood's liability Policy. In that letter, Indian Harbor recognized Akkerman Senterifft as MapleWood's counsel, refused to acknowledge its coverage obligations, and reserved "all rights available to it under the Policy." [Doc. 40-5, p.

12]. On July 9, 2007, Indian Harbor responded to the second suit, via the same insurance litigation counsel in the same way, again reserving all its rights. [Doc. 40-7]. On February 4, 2008, Indian Harbor consented to MapleWood's decision to retain Akerman Senterfitt to defend MapleWood in the underlying actions. Indian Harbor's consent was required under the policy it issued but came almost a year after MapleWood was sued and retained Akerman Senterfitt to defend it. [Doc. 156-1]. Nothing in the public record suggests that Indian Harbor ever sought legal advice or services from Akerman Senterfitt or that Akerman Senterfitt ever provided such services to Indian Harbor. In fact, Akerman Senterfitt appears to have communicated with Indian Harbor only to the extent authorized by MapleWood.

Moreover, Indian Harbor's reservation of rights letters make it clear that MapleWood and Indian Harbor did not share a common interest. Upon examination of the correspondence, Indian Harbor was adverse to the MapleWood upon its initial contact by providing a coverage analysis and reserving all rights. As a result of Indian Harbor's decision to reserve all rights, Indian Harbor's interest were not aligned with MapleWood's interest. Indeed, Indian Harbor's correspondence made clear that it was protecting its own interests—not that of its insureds. Florida law is clear that a carrier decision to issue a defense under a reservation of rights is tantamount to a refusal to provide any defense at all in its effect on the insured. See Nationwide Mut. Fire Ins. Co. v. Beville, 825 So. 2d 999, 1003 (Fla. 2d DCA 2002).

This is precisely the case here – MapleWood hired its own defense counsel and continued to use its own defense counsel when Indian Harbor issued its reservation of rights which effectively denied coverage to MapleWood. MapleWood and Indian Harbor were not joint clients of Akerman Senterfitt.

Furthermore, even if a joint-client relationship could have been formed, Akerman Senterfitt still would have owed a duty of confidentiality to MapleWood upon the emergence of a conflict of interest between MapleWood and Indian Harbor, and it was error for the District Court to compel production of any communications or work product of Akerman Senterfitt touching the conflict. An insurer cannot obtain privileged information that it will later use to harm its insured. The American Law Institute supports this principle and expounds on it. Specifically, the ALI is in the process of adopting the Principles of Law of Liability Insurance into Restatements. See THE AMERICAN LAW INSTITUTE, Restatement of the Law, Liability Insurance, available at https://www.ali.org/projects/show/liability-insurance/. In particular, the Restatement states, in pertinent part, the following:

> § 14 – Duty to Defend – Basic Obligations
> (1)(b) Requires defense counsel to protect from disclosure to the insurer any information of the insured which is protected by attorney-client privilege work-product immunity, or a defense lawyer's duty of confidentiality under rules of professional conduct, if that information could be used for the benefit of the insurer at the expense of the insured.

THE AMERICAN LAW INSTITUTE, Restatement on the Law of Liability Insurance Discussion Draft, p. 110 (April 30, 2015).

The drafter's rationale is stated in comment (e.) Protecting the insured's confidential information and states:

> Because of the potential for uninsured risks, there are circumstances in which confidential information of the insured could be used to benefit the insurer at the expense of the insured, for example confidential information that would assist the insurer to avoid coverage for a claim." In such circumstances, as stated in § 11[discussed below], the insurer does not have the right to receive that confidential information from defense counsel, notwithstanding that information may be relevant to the defense or settlement of the claim. [§ 14] states the corollary rule that the insurer's duty to defend includes the obligation to arrange the defense so that the lawyer retained by the insurer does not have an obligation to the insurer to reveal such confidential information, directly or indirectly, including through withdrawal from the representation of the insured.

Id. at p. 113.

For legal justification of subsection (1)(b), the drafters maintain: "The principle stated in [[§ 14 (1)(b)] addresses the issue underlying the debate between differing approaches to the tripartite relationship between the defense lawyer, the insured, and the insure, such as the "primary client" and "equal weighting" approaches. Compare Tom Baker, Liability Insurance Conflicts and Defense Lawyers: From Triangles to Tetrahedrons, 4 Connecticut Insurance Law Journal 101 (1998)(explaining why the equal-weighting rule is impracticable) and Charles Silver & Kent Syverud, The Professional Responsibilities of Insurance Defense Lawyers, 45 Duke. L.J. 255, 343-348 (1996) (urging an equal coclient approach that would require the defense lawyer to disclose the existence of a conflict of interest and

withdraw). Here, because Indian Harbor disputed coverage, all loyalty and privilege was owed to MapleWood and certain documents created by Akerman Senterfitt were protected by privilege.

C. Cooperation Clause Does Not Eviscerate the Attorney-Client Privilege.

Moreover, to the extent Indian Harbor argues MapleWood was required to cooperate and share information under its policies, this argument fails. Under Florida law, the cooperation clause does not eviscerate the attorney-client privilege. Instead, the cooperation requirement "arises to prevent fraud and collusion in proceedings to determine liability once notice has been given." E. Air Lines, Inc. v. U.S. Aviation Underwriters, Inc., 716 So. 2d 340, 343 (Fla. 3rd DCA 1998) citing Bankers Ins. Co. v. Macias, 475 So. 2d 1216, 1217 (Fla. 1985).

The cooperation requirement applies in Florida only when the insured and the insurer are in a fiduciary relationship; the insurer has the duty to operate in good faith, and the insured "has the reciprocal obligation to allow the insurer to control the defense and to cooperate with the insurer." Doe v. Allstate, 653 So. 2d 371, 374 (Fla. 1995). Where that fiduciary relationship exists, a Florida court may compel production of documents as between the two parties in the relationship. See Allstate Ins. Co. v. American So. Home Ins. Co., 680 So. 2d 1114, 1116 (Fla. 1st DCA 1996) ("where there exists a fiduciary relationship between the party seeking the materials and the party who has them, the courts will compel their production.").

Here, MapleWood and Indian Harbor had no fiduciary relationship because Indian Harbor breached its obligation by failing to protect its insured. Not only did Indian Harbor belatedly response to the tender of the suits, but its response with a reservation of rights acted as a denial. Indian Harbor never acted in good faith in protecting MapleWood, which is further demonstrated by multiple correspondences changing its position in coverage and agreements. More importantly, Indian Harbor took an adversarial position to MapleWood and created a conflict of interest when it disputed coverage under its policies. Because of such conflict, Indian Harbor was not entitled to use attorney-client information against MapleWood. The District Court erred in allowing Indian Harbor to discover, use and rely on such information against its insured – the intended entity it had a duty to protect.

Again, the ALI provides additional insight as to the duty of confidentiality. In particular, the section regarding the cooperation clause and its interaction with the attorney-client privilege in insurance context provides:

> § 11 – Confidentiality
> (2) An insurer does not have the right to receive any information of the insured that is protected by attorney-client privilege, work-product immunity, or a defense lawyer's duty of confidentiality under the rules of professional conduct, if that information could be used to the benefit of the insurer at the expense of the insured.

THE AMERICAN LAW INSTITUTE, Restatement on the Law of Liability Insurance Discussion Draft, p. 91 (April 30, 2015).

The drafters' rationale for subsection (2) is explained by comment d, which states that there is no right to confidential information that could benefit the insurer at the expense of the insured. The comments explains:

> The rule stated in subsection (2) is an insurance law rule that is complimentary to the rules stated in the Restatement Third, The Law Governing Lawyers…under the rule stated in subsection (2) the insurer's right to defense does not include the right to receive confidential information from the defense lawyer which could harm the insured with regard to a matter in dispute, or potentially in dispute, between the insurer and insured. *See* Restatement Third, The Law Governing Lawyers §59.

Id. at p. 92. For legal justification for subsection (2), the Restatement maintains:

> Numerous jurisdictions have held that the 'cooperation clause in . . . insurance policies does not operate to override . . . the attorney-client privilege' and that insurers are therefore not entitled to protected information shared by the insured with counsel. Eastern Airlines, Inc. v. U.S. Aviation Underwriters, Inc., 716 So. 2d 340, 343 (Fla. 3rd DCA 1998). See, e.g., Rockwell Inter. Corp. v. Superior Court, 32 Cal Rptr. 2d 153, 159 (Cal. Ct. App. 1994) ("[W]e refuse to read into the cooperation clause an unintended implied waiver of the attorney-client privilege."); Remington Arms Co. v. Liberty Mutual Ins. Co., 142 F.R.D. 408 (D. Del. 1992) (holding that the insurer could not compel discovery of certain documents because they were protected by attorney-client privilege and likewise not discoverable under work-product doctrine). See also John Buchanan and Wendy Feng, Protecting Privilege While Preserving Coverage, ABA Coverage (March/April 2012) (discussing disclosure obligations of insurance defense counsel).

Id. at 95.

However, the drafters note that courts and commentators have reached divergent conclusions on the insurer's right to protected information. *Compare* Indep. Petrochemical Corp v. Aetna Cas. And Su Co., 654 F. Supp. 1334, 1365

(D.D.C. 1986) on reconsideration 673 F. Supp. 1 (D.D.C. 1986), aff'd, 944 F.2d 940 (D.C. Cir. 1991) (observing that "communications between an insured and its attorney connected with the defense of underlying litigation are normally not privileged vis-à-vis the insured's carriers in subsequent litigation.") and Charles Silver & Kent Syverud, The Professional Responsibilities of Insurance Defense Lawyers, 45 Duke. L.J. 255, 343-348 (1996) (stating that an insurer has the right to information but not obligating the lawyer to provide it) with Trau-Med of Am., Inc. v. Allstate Ins. Co. 71 S.W. 3d 691, 697 (Tenn. 2002) (stating that "the employment of the attorney by the insurer does not impose upon that attorney any duty of [sic] loyalty to the insurer that could impair the attorney-client relationship between the attorney and the insured.").

To allow compulsion of attorney-client privilege documents violates the very principle of rule and the tripartite relationship. If the District Court's order is allowed to stand, no information is protected between an insured and its attorney. This is particular true when a carrier and insured's interests are not aligned which is the case here. Indian Harbor created a conflict of interest and thus shifted all interest and loyalty to MapleWood.

D. There is no Exception to Attorney Opinion Work Product Immunity.

In addition to the attorney-client privilege, communications between an attorney and his or her client are often immune from discovery under the federal

work-product doctrine. "While the attorney-client privilege shields communications between attorney and client (and in some circumstances third parties), the work product doctrine protects an attorney's written materials and 'mental impressions.'" Comm'r of Revenue v. Comcast Corp., 901 N.E. 2d 1185, 1200 (Mass. 2009) (citing Hickman v. Taylor, 329 U.S. 495, 510 (1947)). Work product immunity was intended to protect "the integrity of the adversarial process by creating a zone of privacy and protection for the attorney's preparatory work on a case." Royal Surplus Lines Ins. Co. v. Sofamor Danek Grp., 190 F.R.D. 463, 473 (W.D. Tenn. 1999) (citing Hickman, 329 U.S. at 510-11).

Information protected by the work product doctrine is generally categorized into "fact" and "opinion" work product. An attorney or other representative's mental impressions, conclusions, opinions, or legal theories are afforded greater protection than "fact" work product, which includes "everything else that is eligible for protection as work product." In re Grand Jury Subpoena, 220 F.R.D. 130, 145 (D. Mass. 2004); see also United States v. Nobles, 422 U.S. 225, 238 (1975) (although its protection extends to all documents prepared in anticipation of litigation, "[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case"); In re Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982) (noting that some courts have provided almost absolute protection to the

mental impressions, conclusions, opinions, or legal theories of an attorney); Parkdale Am., LLC v. Travelers Cas. & Sur. Co. of Am., Inc., No. 3:06-CV-78, 2007 WL 4165247 (W.D. N.C. Nov. 19 2007). But cf. Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995) (finding the doctrine does not protect facts concerning the creation of work product or facts contained within the work product); Craig v. O'Charley's Rest. Props. LLC, Case No. 3:09-CV-187, 2010 WL 725574 (W.D. Ky. Feb. 25, 2010) ("The work-product doctrine does not protect facts contained within the work product.").

There is no exception to opinion work-product immunity simply because the communication at issue concerns a topic raised in an insurer's defense. The court in Northwood Nursing & Convalescent Home, Inc. v. Cont'l Ins. Co., 161 F.R.D. 293 (E.D. Pa. 1995), held that opinions, memoranda, and communications of law firm representing insureds in suits against them were unnecessary to liability insurer's defense of bad-faith suit and, therefore, were protected as attorney work product, because the attorney's opinions were not relevant to the insureds' intent. Here, the District Court erred in compelling disclosure of attorney opinion work product. No exception to attorney opinion work product immunity is applicable and the District Court's Order should be reversed.

CONCLUSION

Based on the foregoing, Amicus Curiae, United Policyholders, respectfully

requests this Honorable Court reverse the District Court's judgment and remanded for further proceedings consistent with the Court's opinion.

Dated: July 6, 2015

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☑ This Brief contains 3,643 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

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By: /s/ Molly A. Chafe
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by U.S. Mail and electronic mail via the Court CM/EMF system to DAVID MICHAEL GISCHE, ESQ., THOMAS S. HAY, ESQ., STEVEN W. McNUTT, ESQ., AND GABRIELA A. RICHEIMER, ESQ. (Counsel for INDIAN HARBOR INSURANCE COMPANY), Troutman Sanders, LLP, 401 9th Street, N.W., Suite 1000, Washington, DC 20004, steve.mcnutt@troutmansanders.com, and MICHAEL J. HIGER, ESQ. (Counsel for INDIAN HARBOR INSURANCE COMPANY), Higer Litchter & Givner, LLP, 18305 Biscayne Boulevard, Suite 402, Aventura, FL 33160, mhiger@hlglawyers.com and JOHN WILLIAM SCHRYBER, ESQ., DAVID JAMES BIRD, ESQ., RICHARD LEE HEPPNER, JR., ESQ., MICHAEL

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 12-CV-81397-KAM

SUN CAPITAL PARTNERS, INC.,

Plaintiff,

v.

TWIN CITY FIRE INSURANCE COMPANY, INC.,

Defendant.

_____/

ORDER DENYING PLAINTIFF'S OBJECTIONS TO DISCOVERY ORDER

This cause is before the Court on Plaintiff's Objections to the December 3, 2014 Discovery Order (DE 94), in which Plaintiff objects to the magistrate judge's Order Granting in Part and Denying in Part Plaintiff's Motion to Quash and/or Motion for Protective Order Regarding Subpoenas Related to the Underlying Litigation (DE 88). The objection is ripe for review, and for the following reasons, the Court concludes that the magistrate judge's order should be affirmed.

I. Background

This is an insurance coverage dispute regarding Defendant Twin City Fire Insurance Company's (Twin City) obligation to indemnify Plaintiff Sun Capital Partners (Sun Capital) for its share of a settlement in an underlying lawsuit. Plaintiff was a defendant in that lawsuit; also defendants were Mervyn's Klaff Equity, LLC, Acadia Realty Trust, LLC, MDS Realty Holdings, I, LLC, and JDA Agent, LLC. (DE 94 at 2).

To determine what claims Plaintiff settled in the underlying action and for how much,

Defendant served nonparty subpoenas on Plaintiff's co-defendants. (See DE 88 at 2). In general, these subpoenas sought documents from Plaintiff's co-defendants "relating to any allocation of covered versus non-covered claims under any policy providing coverage" for the underlying lawsuit and documents "relating to any negotiations between you and Sun Capital to allocate the settlement amounts" in the underlying lawsuit. (Id. at 3). Plaintiff objected to this nonparty discovery. (DE 56).

By and large, the magistrate judge rejected Plaintiff's objections and ordered and that all responsive documents be produced. (DE 88 at 10 11). The court found that Defendant's requests for documents were relevant as they would lead to the discovery of admissible evidence regarding the nature of the insurance policy at issue as well as proof that Plaintiff made a payment under the settlement agreement. (Id at 7-8). The court rejected Plaintiff's contention that the information requested was protected by the "joint defense or common interest privilege." (Id. at 5). The court accepted Defendant's argument that, if Plaintiff shared a common interest with its co-defendants in the underlying lawsuit, "Defendant [also] share[d] a common interest with Plaintiff" and could therefore gain access to the allegedly privileged documents shared between Plaintiff and its co-defendants. (Id. at 9).

Plaintiff objects to the magistrate judge's order "to the extent it held that Defendant . . . shares a common interest with [Plaintiff], thus obligating [Plaintiff] and its co-defendants to produce documents otherwise subject to attorney-client privilege and work product immunity." (DE 94 at 1; see also DE 115 at 1 (Plaintiff noting that the "only issue" raised in its objection is whether Defendant "shares a common interest with" Plaintiff)).

II. Discussion

The magistrate judge's ruling on a non-dispositive matter must be affirmed unless "it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); accord Fed. R. Civ. P. 72(a); L. Magistrate R. 4(a)(1). The "clearly erroneous or contrary to law" standard of review is extremely deferential. Tolz v. Geico Gen. Ins. Co., No. 08-80663-CIV, 2010 WL 298397, at *3 (S.D. Fla. Jan. 19, 2010). A finding is clearly erroneous only if "the reviewing court, after assessing the evidence in its entirety, is left with a definite and firm conviction that a mistake has been committed." Krys v. Lufthansa German Airlines, 119 F.3d 1515, 1523 (11th Cir.1997). "The mere fact that a reviewing Court might have decided the issue differently is not sufficient to overturn a decision when there are two permissible views of the issue." Tolz, 2010 WL 298397, at *3 (quoting Pendlebury et al. v. Starbucks Coffee Co., Case No. 04-80521, 2007 WL 4592267, at *2 3 (S.D. Fla. December 28, 2007)). With respect to the "contrary to law" variant of the test, an order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure. Pigott v. Sanibel Development, LLC, Case No. 07-0083, 2008 WL 2937804 at *5 (S.D. Ala. July 23, 2008).

A brief word on Plaintiff's standing. Before the magistrate judge, Defendant argued that Plaintiff lacked standing to challenge its nonparty subpoenas "as they place no production requirements on Plaintiff." (DE 88 at 10). The magistrate judge rejected Defendant's argument because any party may object to discovery on the ground that it is irrelevant. (Id.) (citing Fed. R. Civ. P. 26(c)). Likewise, Plaintiff has standing to object to the magistrate judge's "common interest" finding as "courts have held that parties have standing to move to quash or modify third-party subpoenas where the materials sought implicate those parties' right to privacy or their

attorney-client or work-product privileges." In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liab. Litig., No. 8:10ML2151 JVS FMOX, 2012 WL 9245988, at *2 (C.D. Cal. Jan. 25, 2012) (collecting cases).

Turning to the merits of Plaintiff's objection, the "common interest rule" serves to "protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense or strategy has been decided upon and undertaken by the parties and their respective counsel." United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989). In the context of the work product doctrine, the rule "allows parties facing a common litigation opponent to exchange privileged communications and attorney work product in order to prepare a common defense without waiving either privilege." Fojtasek v. NCL (Bahamas) Ltd., 262 F.R.D. 650, 654 (S.D. Fla. 2009).

Although often invoked as a shield to prevent discovery by parties outside the common-interest relationship, at least one court in this district has employed the common interest rule as a sword to compel discovery between parties within a common-interest relationship. See MapleWood Partners, L.P. v. Indian Harbor Ins. Co., 295 F.R.D. 550 (S.D. Fla. 2013). The parties seem to agree that MapleWood is the "seminal case analyzing the common interest doctrine between insureds and insurers" (DE 107 at 11; see DE 94 at 10), and thus the case that guides this Court's determination of whether Defendant is entitled to discovery from Plaintiff's co-defendants.

MapleWood involved an insurance-coverage dispute between several insureds, the plaintiffs, and their primary insurer, the defendant. 295 F.R.D. at 556. The defendant insurer sought discovery from the insureds and their attorneys regarding the underlying litigation against

the insured, "including assessments of potential liability and estimates of settlement values." Id.

The court held that the insurer was entitled to the discovery it sought:

> In conclusion, the Court finds that Plaintiffs and Defendant essentially were co-clients of [Plaintiffs' attorney] as to the defense of the Underlying Matters and, thus, have no privilege to assert against the disclosure of communications or documents to each other which were shared between any party and [Plaintiff's attorney] on that subject. This conclusion is based on the Court's finding that Plaintiffs purchased the Policy, a directors and officers liability policy with a cooperation clause, and subsequently made a claim under the Policy, effectively inviting the insurer into the Plaintiffs' relationship with its selected counsel, at least temporarily and only as to this subject matter. This is analogous to the situation in which a general liability insurer, with a duty to defend, has a shared interest with its insured for the purpose of the defense of the action, as recognized in Florida law.
>
> Alternatively, even if Plaintiffs and Defendant were not effective co-clients, they at a minimum had a common legal interest in the defense of the Underlying Matters such that they are not entitled to avoid disclosure between themselves as to otherwise privileged materials. The Court's conclusion does not require Plaintiffs to disclose communications purely relating to the pending coverage dispute before this Court, but does require disclosure of all documents relating to the RRGC settlement or any of the Underlying Matters regardless of the date.

Id. at 613-14 (internal footnotes omitted).

Regarding the first conclusion that the "joint client" doctrine applied the Court noted that its conclusion was "based on the Court's determination that under the specific facts of this case, including the terms of the Policy and the status of the clients the insurer stood in a joint-client relationship with its insured as to the defense of the Underlying Matters and, as such, the question of a shared attorney-client privilege was answered in the affirmative." Id. at 605.[1]

[1] In this case, the magistrate judge's order is not based on the "joint client" doctrine, and Defendant does not argue that this doctrine applies but rather the "common interest" doctrine.

The court then noted the following: "The answer to the question is more elusive, however, if the insurer and insured are not considered to be joint clients of the defense attorney but instead their relationship is examined to determine whether they shared a 'common legal interest' in the Underlying Matters." Id. The court went on to address this alternative theory.

The court noted that the "common legal interest" doctrine or "joint-defense" doctrine empowers "attorneys representing clients with similar legal interests [to] share information without risk of being compelled to disclose such information generally." Id. at 605. "However, if the parties to [the joint-defense] agreement are later in opposition with each other, statements which were made by one co-defendant to another defendant's attorney are not protected by privilege." Id. at 606. Concerning whether a "common interest" exists, the court noted that the "[i]nterests of the members of the joint defense group need not be entirely congruent." Id. at 605. "A common interest can be found to exist even if some conflict is present or stands between the clients." Id. at 605 n.227.

Applying the common interest doctrine to the facts before it, the MapleWood court found simply as follows: "The interests of Plaintiffs (and their entire joint defense group) were aligned with [Defendant] as all had an interest in minimizing liability in the Underlying Matters." Id. at 607. The court noted the insureds opposition to this finding:

> Plaintiffs oppose the application of the "common legal interest" doctrine to this case and argue, essentially, that once the interests of an insurer and its insured become adverse, the insured's prior communications (even if they previously were required to be disclosed to the insurer pursuant to a cooperation clause) become privileged retroactively.

The MapleWood court noted that "[t]hese two doctrines are distinct and do not overlap." 295 F.R.D. at 594; see also id. at 606 n.230.

Id. at 607. The court rejected this approach as "impractical." Id. Elsewhere, the court noted the "adverse" interests inherent to the insurer insured relationship do not necessarily preclude a finding of common interest:

> The legal interest shared by an insurer and its insured exists, thus, regardless of whether the insurer controls the litigation, as long as the parties shared a unified or allied interest in defending an underlying action. Indeed, an insurer may begin the defense of its insured under a reservation of rights (to deny coverage at a later time) and still be considered to have an allied interest.

Id. at 605 n.225.

The court went on to discuss the type of documents that must be disclosed pursuant to the parties' common legal interest:

> The communications which are subject to disclosure under this theory must have been those communications made in furtherance of an ongoing common legal interest, the relevant question being: whether the information was exchanged [between the clients] for the limited purpose of assisting in their common cause. In this case, the Court has determined that Plaintiffs and Defendant had a common legal interest in minimizing liability or exposure to a judgment in the Underlying Matters. The privilege log includes communications or documents which relate to calculations of settlement value or options (which also may reveal information as to the respective liability of the defendants in the Underlying Matters), litigation outcomes (which may include an assessment of the respective value of each claim in the Underlying Matters), and the representation of individual defendants and questions regarding attorneys' fees payments (which may reveal information as to the apportionment of attorneys' fees among clients/subjects). Such documents appear to qualify as attorney-client privileged documents (or, perhaps, are immune from production as attorney work-product) but even if so they are still discoverable by Defendant in light of this Court's conclusion that Defendant is a joint client with Plaintiffs or, alternatively, that Defendant was an allied party with a common legal interest.

Id. at 611-12 (internal citations, footnotes, and quotation marks omitted) (alteration in original).

Accordingly, the court held that the insurer was entitled to discovery of communications "between [the insureds] as to otherwise privileged materials." Id. at 613.

Turning to the case at hand, the magistrate judge found "that Defendant shares a common interest with Plaintiff." (DE 88 at 9). The court had before it several pieces of evidence that support such a finding:

First, as the MapleWood court found in that case, it could readily be said that the insurer, Defendant Twin City, had an "interest in minimizing [the] liability or exposure to a judgment" of its insured, Plaintiff Sun Capital, in the underlying litigation. See MapleWood, 295 F.R.D. at 611.

Second, the magistrate judge was presented with at least two documents that memorialized a "common interest" between Defendant and Plaintiff with regard to the underlying litigation. In a December 2009 "Joint Defense, Common Interest, Privilege and Confidentiality Agreement," Plaintiff and Defendant agreed that they shared "commonality of interest with respect to defending against the claims or causes of action that are asserted in the [Fraud] Litigation" against Plaintiff. (DE 64 at 4; DE 64-6; see also DE 88 at 9 (citing DE 64 at 3-5)). Additionally, in a Mach 2011 "Joint Defense and Confidentiality Agreement," Plaintiff and Defendant agreed that they "share a common interest in defense of the Litigation Matter." (DE 56-7 at 2).

Finally, the insurance policy at issue contained a cooperation clause. (DE 1-1 at 4). The fact that Plaintiff "voluntarily purchased an insurance policy which included a cooperation clause" indicates that "the insurer and insured would share the same legal agenda if faced with any claims made against the insured." See MapleWood, 295 F.R.D. at 613.

Considering the evidence before the magistrate judge and the extremely deferential nature of this Court's review, the Court cannot find that the magistrate judge was "clearly erroneous" in his finding that Defendant shared a common interest with Plaintiff in the underlying litigation.

Plaintiff argues to the contrary. It raises five arguments against the magistrate judge's finding of a shared common interest: (1) MapleWood is "readily distinguishable" as it involved an insureds dispute with its primary insurance carrier, as opposed to an excess carrier such as Defendant; (2) a common interest cannot exist because Defendant has taken an "antagonistic" position against Plaintiff "from the outset"; (3) Plaintiff has never provided Defendant any communications without asserting that those communications would remain privileged; (4) the cooperation clause on its own does not defeat any privilege; and (5) Defendant has anticipated coverage litigation with Plaintiff since at least September 2, 2010. (DE 94 at 10-16). After considering Plaintiff's arguments, the Court is not left with a definite and firm conviction that the magistrate judge committed an error in finding that the parties once shared a common interest.

First, the Court fails to see how the "common interest" doctrine as described by the Court in MapleWood is limited to primary insurers as opposed to all insurers potentially liable for their insured's liability. See MapleWood, 295 F.R.D. at 605-14. Even secondarily liable insurers may have an "legal interest in minimizing liability or exposure to a judgment" of their insureds. Id. at 611. The fact that another insurer appointed counsel and was primarily responsible for the insureds defense does not preclude a finding of an allied interest with a secondary insurer. See id. at 605 n.225.

Second, the fact that Defendant took an early position that most of the claims against Plaintiff were not covered does not preclude a finding of a "common legal interest." As the

MapleWood court noted, the "[i]nterests of the members of the joint defense group need not be entirely congruent." Id. at 605. Even where an insurer "begin[s] the defense of its insured" by reserving its rights (and later denying coverage), it still may be "considered to have an allied interest" in the underlying litigation with its insured. Id. at 605 n.225. The magistrate judge did not clearly err in so finding.

Third, the fact that Plaintiff produced documents to Defendant while reserving its attorney-client and work product privileges does not preclude the finding that Defendant nonetheless shared a common interest with Plaintiff in the defense of the underlying litigation. The agreement under which the documents were produced indicates as much. (See DE 56-7 at 2) ("Sun Capital and the Insurers share a common interest in the defense of the Litigation Matter."). Additionally, a party cannot preserve a privilege that has otherwise been waived by merely asserting that the privilege continues to exist. Cf. CP Kelco U.S. Inc. v. Pharmacia Corp., 213 F.R.D. 176, 179 (D. Del. 2003) (parties are not "free to invoke an already waived privilege").

Fourth, the cooperation clause is but one piece of evidence indicating that Plaintiff and Defendant shared a common interest in defending the underlying litigation. Defendant does not argue and the magistrate judge did not find that that clause alone displaces Plaintiff's attorney-client privilege in this case.

Finally, Plaintiff's argument concerning "anticipated" litigation is drawn from the portion of the MapleWood court's decision regarding the "joint client" doctrine, not the "common interest" doctrine. (DE 94 at 16); MapleWood, 295 F.R.D. at 594-605 ("A joint client relationship among the Plaintiffs and Defendant can be considered to have existed at least until January 1, 2008, the date on which the parties agree that they first anticipated that they would be

in litigation against each other.") (emphasis added). The court did not indicate how or whether the anticipation of eventual litigation affects the "common interest" doctrine, which the parties argue applies here. Given that MapleWood indicated that the parties may have a common interest even when they are "on notice that they might end up in a subsequent dispute as to coverage," id. at 605 n.225, the anticipation of litigation does not seem to affect the triggering of the "common interest" doctrine. Moreover, the magistrate judge had before him evidence that Defendant did not "anticipate" litigation with Plaintiff as early as Plaintiff claims, but rather as late as November 2012. (DE 107 16-18).

Although it asserts that the "common interest" issue is the "only issued raised" in its objection (DE 115 at 1), Plaintiff also objects to the scope of the magistrate judge's order upholding the nonparty subpoenas. (DE 94 at 7). Plaintiff argues that "only those documents relevant to the purported interest shared between Sun and Twin minimizing Sun's liability are even arguably fair game." (Id.). The Court notes that the court in MapleWood found that the common interest doctrine provided the insured access to "communications or documents which relate to calculations of settlement value or options . . . , litigation outcomes . . . , and the representation of individual defendants and questions regarding attorneys' fees payments." 295 F.R.D. at 611-12. Defendant's nonparty subpoenas are limited to seeking similar information. (See DE 88 at 2 5). The Court rejects Plaintiff's contention that documents created before the co-defendants' "first global mediation" are not relevant (or likely to lead to the discovery of materials relevant) to the inquiry of "what the parties settled for and why." (See DE 94 at 8). To the extent Plaintiff argues that the magistrate judge improperly ordered that "all attorney-client privileged or work product immune documents" be produced

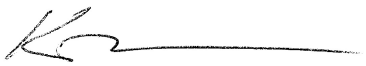
(DE 94 at 7), the Court notes that the order preserves the subpoenaed parties' right to produce documents "[s]ubject to any claim of privilege" (DE 88 at 10-11).

III. Conclusion

In conclusion, the Court is not left with the definite and firm conviction that the magistrate judge erred by finding that Defendant shared a common interest with Plaintiff in the underlying litigation. The December 3, 2014 Order shall be affirmed.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Plaintiff's Objections to the December 3, 2014 Discovery Order (DE 94) are **DENIED**, and the magistrate judge's Order Granting in Part and Denying in Part Plaintiff's Motion to Quash and/or Motion for Protective Order Regarding Subpoenas Related to the Underlying Litigation (DE 88) is **AFFIRMED**.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, Florida, this 2nd day of July, 2015.



KENNETH A. MARRA
United States District Judge