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### PREVIEW; High Country Paving, Inc. v. United Fire & Casualty Co.: *Waiver of Attorney-Client Privilege and Work Product Doctrine*

Deanna Rothwell

*Alexander Blewett III School of Law*

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**PREVIEW; High Country Paving, Inc. v. United Fire & Casualty, Co.: Waiver of Attorney-Client Privilege and Work Product Doctrine**

**Deanna Rothwell**

The Ninth Circuit was originally set to hear oral argument on this matter on Tuesday, March 31, 2020. On March 11, 2020, the Court deemed the matter suitable for decision without oral argument. Nonetheless, given the importance of the issues presented by this extraordinary writ, the *Montana Law Review* presents the following preview for *High Country Paving, Inc. v. United Fire & Casualty Co.*

**I. INTRODUCTION**

This case presents the issue of when the attorney-client privilege and work product protections can be waived. An employee of High Country Paving, Inc. (“High Country”) was involved in an automobile accident that resulted in the death of one and the serious injury of another. High Country’s liability insurer, United Fire & Casualty Co. (“United Fire”), settled with the third-party victims for policy limits without obtaining a release for High Country. As a result, High Country sued United Fire for unfair claim settlement practices and breach of contract.

During discovery, both parties moved to compel the production of privileged information which the district court granted. On November 11, 2019, High Country filed a Petition for Writ of Mandamus before the United States Court of Appeals for the Ninth Circuit, arguing that the mental impressions of its attorneys are not directly at issue in this case, and, therefore, there was no waiver of privileges. Additionally, High Country argues that United Fire failed to establish the requirements necessary to discover work product. United Fire contends that High Country placed its attorneys’ mental impressions directly at issue and that, therefore, discovery of attorney communications and work product is warranted.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

In August 2016,<sup>1</sup> a High Country employee was involved in an automobile accident that killed one person and injured another.<sup>2</sup> Following the accident, the injured parties filed a third-party claim that

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<sup>1</sup> Plaintiff’s Preliminary Pretrial Statement at 3, *High Country Paving, Inc. v. United Fire & Casualty Co.* (D. Mont. Mar. 27, 2019) (No. 18-cv-00163-DWM).

<sup>2</sup> Petition for Writ of Mandamus at 3, *High Country Paving, Inc. v. United Fire & Casualty Co.* (9th Cir. Nov. 12, 2019) (No. 19-72853).

triggered High Country's liability coverage.<sup>3</sup> United Fire was High Country's liability insurer at the time of the accident.<sup>4</sup> United Fire settled with the third-party claimants for policy limits.<sup>5</sup> Notably, United Fire, over High Country's objection, failed to obtain a release for High Country as part of the settlement.<sup>6</sup> High Country then separately negotiated a settlement with the third-party claimants, "paying an additional \$1.275 million and assigning certain legal claims in exchange for a release."<sup>7</sup> High Country then sued United Fire in federal court alleging state law claims for unfair claim settlement practices<sup>8</sup> and breach of contract.<sup>9</sup> United Fire argued that it acted reasonably in "paying the policy limits without obtaining a release" and "in relying on the advice of counsel in making coverage decisions."<sup>10</sup>

Both United Fire and High Country filed motions to compel disclosure of attorney-client privileged communications and documents protected by the work-product doctrine.<sup>11</sup> United Fire sought to discover "any communications containing any evaluation" of the third-party claims<sup>12</sup> to "corroborate United Fire's conclusion."<sup>13</sup> Both motions were granted.<sup>14</sup> The district court found that there was a waiver of both privileges by High Country for two reasons.<sup>15</sup> First, although High Country had not designated its attorneys as expert witnesses, it did place its attorney's letters and valuations of the underlying case directly at issue.<sup>16</sup> The district court found that this amounted to a waiver of the attorney-client privilege by High Country.<sup>17</sup> Second, the district court determined that although the evaluations were indisputably prepared "in anticipation of litigation," High Country put the assessments at issue by

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 4.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> First Amended Complaint and Demand for Jury Trial at 22-25, *High Country Paving, Inc. v. United Fire & Casualty Co.* (D. Mont. Mar. 29, 2019) (No. 18-cv-00163-DWM).

<sup>9</sup> *Id.* at 25-30.

<sup>10</sup> Answer to Amended Complaint at 20-22, *High Country Paving, Inc. v. United Fire & Casualty Co.* (D. Mont. April 18, 2019) (No. 18-cv-00163-DWM).

<sup>11</sup> See Plaintiff's Combined Brief Re: Motions to Compel, *High Country Paving, Inc. v. United Fire & Casualty Co.* (D. Mont. Aug. 2, 2019) (No. 18-cv-00163-DWM); See also Defendant's Motion to Compel Based on Waiver of Work Product and Attorney-Client Privilege, *High Country Paving, Inc. v. United Fire & Casualty Co.* (D. Mont. July 15, 2019) (No. 18-cv-00163-DWM).

<sup>12</sup> Defendant's Motion to Compel, *supra* note 11, at 1.

<sup>13</sup> Defendant's Brief in Support of Motion to Compel Based on Waiver of Work Product and Attorney-Client Privilege at 7, *High Country Paving, Inc. v. United Fire & Casualty Co.* (D. Mont. July 15, 2019) (No. 18-cv-00163-DWM).

<sup>14</sup> Opinion and Order at 14, *High Country Paving, Inc. v. United Fire & Casualty Co.* (D. Mont. Nov. 4, 2019) (No. 18-cv-00163-DWM).

<sup>15</sup> *Id.* at 10-12.

<sup>16</sup> *Id.* at 11.

<sup>17</sup> *Id.*

“challenging the reasonableness of United Fire’s settlement decision.”<sup>18</sup> Because there was no other source for information regarding High Country’s assessment of its legal liability, any work product protection was waived.<sup>19</sup> High Country then filed a Petition for Writ of Mandamus with the Ninth Circuit asking the Court to vacate the district court’s order.<sup>20</sup>

### III. SUMMARY OF THE ARGUMENTS

#### A. Background

As a threshold matter, in federal diversity cases, privilege issues are controlled by the forum state’s substantive law, while work product issues are governed by federal law.<sup>21</sup> Accordingly, in this case, Montana law governs the attorney-client privilege issue while federal law applies to the work product doctrine dispute.

Both parties utilize *Dion v. Nationwide Mutual Insurance Company*<sup>22</sup> and *Palmer by Diacon v. Farmers Insurance Exchange*<sup>23</sup> as the main authorities in this case. *Dion* involved a motion to compel both attorney-client communications and work product from an insurance company that refused to pay some of the plaintiff’s claims for benefits.<sup>24</sup> The Court held that the work product at issue was discoverable under Rule 26 of the Federal Rules of Civil Procedure and that the insurance company had waived the opinion work product protection.<sup>25</sup> First, the Court found that because the plaintiff’s claims required her to establish that the insurer lacked reasonable justification for refusing the payments, the mental impressions and opinions of the insurer, and therefore its attorneys, were directly at issue and the plaintiff’s need for that information was overwhelming based on the fact that claim processing “is almost entirely an internal operation and [the insurer’s] claims file reflects a unique, contemporaneous record of the handling of the claim.”<sup>26</sup> Second, the Court found that in naming its attorney as an expert witness, the insurance company waived its opinion work product

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<sup>18</sup> *Id.* at 11–12.

<sup>19</sup> *Id.* at 12.

<sup>20</sup> See Petition for Writ of Mandamus, *supra* note 2.

<sup>21</sup> Opinion and Order, *supra* note 14, at 2; Fed. R. Civ. P. 501.

<sup>22</sup> 185 F.R.D. 288 (D. Mont. 1998).

<sup>23</sup> 861 P.2d 895 (Mont. 1993).

<sup>24</sup> *Id.* at 290–92.

<sup>25</sup> *Id.* at 292–94.

<sup>26</sup> *Id.* at 292–93.

protection because without discovery of those files, the plaintiff's ability to effectively cross examine witnesses would be impaired.<sup>27</sup>

In *Palmer*, the plaintiff sued an insurance company for bad faith.<sup>28</sup> The district court had allowed evidence from an underlying trial, including privileged information, to be admitted.<sup>29</sup> The plaintiff claimed that the insurance company waived its privilege by stating it would retain new counsel in order to potentially call its original counsel as witnesses.<sup>30</sup> The Court determined that this statement did not amount to a waiver because it had not been sent until a year after the district court ordered the production of the insurer's privilege documents and that "even then, [the insurer] stated that the attorney's would testify to factual matters, but would not testify regarding confidential privileged information."<sup>31</sup> The Court further denied the insured's claims that the insurer waived attorney-client privilege and stated that reliance on an attorney's advice is not the crucial factor in determining waiver.<sup>32</sup>

The *Palmer* Court also detailed the difference between ordinary work product and opinion work product.<sup>33</sup> To discover materials considered ordinary work product, a party must establish that the materials are relevant, the party must demonstrate a substantial need for the materials, and the party cannot obtain the substantial equivalent of the materials through other means, without undue hardship.<sup>34</sup> The Court applied this test and held that in a bad faith case, the insurer's mental impressions and opinions are directly at issue to determine whether an insurer's denial is reasonable.<sup>35</sup> However, the Court also made clear that without an advice of counsel defense, the attorney's mental impressions and opinions are not at issue and relevant opinion work product is not discoverable.<sup>36</sup>

### B. *High Country's Argument*

High Country presents three main arguments: (1) it did not bring any claim or defense that put the attorney's mental impressions directly at issue; (2) it did not name its attorney's as expert witnesses; and (3)

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<sup>27</sup> *Id.* at 293.

<sup>28</sup> *Palmer*, 861 P.2d at 899.

<sup>29</sup> *Id.* at 899-900.

<sup>30</sup> *Id.* at 900.

<sup>31</sup> *Id.* at 906.

<sup>32</sup> *Id.* at 907.

<sup>33</sup> *Id.* at 910.

<sup>34</sup> Fed. R. Civ. P. 26(b)(3)(A)(i)-(ii).

<sup>35</sup> *Palmer*, 861 P.2d at 911.

<sup>36</sup> *Id.* at 911-12.

United Fire cannot show the requisite “overwhelming” need in order to be granted discovery of protected work product.

High Country presents two reasons in support of its argument that it has not waived attorney-client privilege. The first reason is that High Country did not put the attorney’s mental impressions directly at issue because the letters sent to United Fire are not waivers<sup>37</sup> and the issue in this case does not call into question the mental impressions of High Country’s attorneys.<sup>38</sup> High Country contends that sending the letters to United Fire did not amount to a waiver of the attorney-client privilege because both letters only stated the public legal position of High Country<sup>39</sup> and do not contain the valuations or assessments of its attorneys.<sup>40</sup> High Country argues that the letters are not an affirmative use of privileged information.<sup>41</sup> High Country also argues that the issue in this case is whether United Fire breached its duties to High Country by unfairly prioritizing its own interests, and therefore, the issue does not put High Country’s attorneys’ mental impressions directly at issue.<sup>42</sup>

The second reason High Country argues it has not waived attorney-client privilege is that High Country named its attorneys as fact, not expert, witnesses.<sup>43</sup> Thus, their potential testimony does not amount to a waiver.<sup>44</sup> High Country contends that asking the court for a ruling based on what the attorneys might say acts would amount to an improper advisory opinion and is inappropriate.<sup>45</sup> High Country agrees with United Fire that if its attorneys were to testify about work product or privileged communications, then it would be a waiver on the part of High Country.<sup>46</sup> High Country also agrees with United Fire’s assertion that testimony from High Country’s attorneys is not necessary and that it has no intention of calling either attorney unless it is deemed necessary to rebut other witnesses.<sup>47</sup> These two circumstances, according to High Country, makes the district court’s advisory decision improper and inappropriate.

High Country asserts that its work product remains protected for the same two reasons detailed above as well as because United Fire has not

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<sup>37</sup> Plaintiff’s Combined Brief, *supra* note 11, at 10.

<sup>38</sup> Petition for Writ of Mandamus, *supra* note 2, at 21.

<sup>39</sup> Plaintiff’s Combined Brief, *supra* note 11, at 11.

<sup>40</sup> Petition for Writ of Mandamus, *supra* note 2, at 20.

<sup>41</sup> Plaintiff’s Combined Brief, *supra* note 11, at 11–12.

<sup>42</sup> Petition for Writ of Mandamus, *supra* note 2, at 6.

<sup>43</sup> Plaintiff’s Combined Brief, *supra* note 11, at 12–13.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 13.

<sup>46</sup> *Id.* at 13–14.

<sup>47</sup> *Id.* at 14.

shown the “overwhelming” need required, absent a waiver, to access High Country’s opinion work product.<sup>48</sup> The “conclusions, analysis, advice and legal theories” of a party’s attorneys are considered opinion work product which is highly protected.<sup>49</sup> High Country contends that the arguments United Fire puts forth to obtain access to High Country’s opinion work product does not meet the exacting standard required to overcome opinion work product protection.<sup>50</sup>

### C. *United Fire’s Argument*

United Fire has two main arguments: (1) High Country has waived both its attorney-client privilege and its opinion work product protection regarding the evaluations of liability produced by its attorneys; and (2) it can show the relevance, need, and hardship required to overcome the work-product privilege High Country has asserted in relation to the evaluations of its potential liability

With respect to the first argument, United Fire contends that High Country has waived the attorney-client privilege by entering into evidence the letters sent by High Country’s attorney because those letters contain the opinions of its attorneys and therefore puts the attorneys’ mental impressions directly at issue.<sup>51</sup> United Fire argues that, based on the analysis done by the Court in *Dion*,<sup>52</sup> the attorney-client privilege was waived because High Country is intending to utilize its attorneys as witnesses and has made the confidential communications a material issue.<sup>53</sup> United Fire asserts that the designation of High Country’s attorneys as fact witnesses does not distinguish this case from *Dion*.<sup>54</sup> Further, United Fire asserts that the use of the letters sent by its attorneys to United Fire as evidence have the same effect as its counsel testifying to his opinions.<sup>55</sup> Thus, introduction of those letters waives the privilege.<sup>56</sup>

Overall, United Fire argues that not allowing it to have access to the attorney-client communications “prejudices [its] defense of this action.”<sup>57</sup> United Fire also contends that High Country’s attorneys have no purely factual information that could not be offered by another and

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<sup>48</sup> *Id.* at 14–15.

<sup>49</sup> Petition for Writ of Mandamus, *supra* note 2, at 16.

<sup>50</sup> Plaintiff’s Combined Brief, *supra* note 11, at 15.

<sup>51</sup> *Id.* at 16.

<sup>52</sup> *Dion*, 185 F.R.D. at 294–95.

<sup>53</sup> Defendant’s Brief in Support of Motion to Compel, *supra* note 13, at 16–17.

<sup>54</sup> *Id.* at 18.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 19–20.

therefore, any testimony they would give would implicate his thoughts, making discovery necessary.<sup>58</sup>

With respect to the second argument, United Fire argues that there are multiple ways in which High Country's evaluations are relevant. One, United Fire argues that, based on the interrogatories, High Country is taking the position that \$3 million was not a reasonable settlement value of the claims which makes the attorney's valuations relevant to the credibility of that position.<sup>59</sup> Two, United Fire argues that High Country's attorney's evaluations are relevant because the fact that High Country was willing to pay an additional \$1.275 million insinuates that the internal evaluations will corroborate United Fire's evaluation that the claim's settlement value exceeded \$3 million.<sup>60</sup> Third, United Fire also contends that High Country's argument that United Fire took away High Country's ability to escape paying its own money to the claimants makes all internal assessments relevant.<sup>61</sup>

United Fire contends that it has shown the need required for the discovery of work product through the following arguments. First, United Fire claims it is critical to know the settlement value of the claims for multiple reasons. It claims that the settlement value is critical because if High Country's evaluations support United Fire's evaluation, then the Montana Supreme Court will affirm United Fire's decision to pay the policy limit without a release.<sup>62</sup> It also asserts that High Country's evaluations assess the credibility of High Country's statement that its liability could be less than \$3 million.<sup>63</sup> Finally, United Fire maintains High Country's claims evaluations will demonstrate whether High Country actually believed that United Fire took away the ability of High Country to escape paying its own money.<sup>64</sup>

United Fire argues that it also meets the third element required to waive work product protection because it has no other way to obtain that information except for through depositions and High Country's written evaluations.<sup>65</sup>

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<sup>58</sup> *Id.* at 20.

<sup>59</sup> Defendant's Brief in Support of Motion to Compel, *supra* note 13, at 2.

<sup>60</sup> *Id.* at 2–3.

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.* at 13.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 13.

<sup>65</sup> *Id.* at 15.



#### IV. ANALYSIS

The critical questions before the court are as follows: (1) whether High Country placed its attorney's letters and valuations directly at issue; and (2) whether United Fire has shown the requisite relevance, need, and hardship for the discovery of ordinary work product plus the additional overwhelming or compelling need for discovery of opinion work product. In both *Palmer* and *Dion*, the Court dealt with motions to compel directed at insurance companies. This appeal, on the other hand, is dealing with a motion to compel directed at the insured. This distinction alters the analysis because the Court must determine how the standards put in place in *Palmer* and *Dion* apply to the insured. Nevertheless, some cases have dealt with motions to compel against the insured and discovery of privileged or protected documents.

One such case is *MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*,<sup>66</sup> which held that by bringing a breach of contract suit that alleged unfair allocation of coverage, the plaintiff placed its attorney's assessments whether the allocation was fair directly at issue, thereby waiving any attorney-client privilege.<sup>67</sup> High Country distinguishes *Maplewood Partners* and argues that the issue in this case is not about the fairness of the settlement but is instead about whether United Fire breached its duties to High Country by unfairly prioritizing its own interests.<sup>68</sup>

In determining the answer to this first question, the Ninth Circuit will have to decide whether the issue is centrally about the fairness of the settlement or about what Montana law requires of insurance companies. If the Ninth Circuit determines that the case is about the first question, then it is likely that, following its prior holding in *Palmer*, the Court will likely affirm and find that the mental impressions of High Country's attorneys are actual issues in the case, making discovery necessary. However, if the Court determines that the question here is more centrally about whether Montana law requires insurance companies to pay out reasonably clear damages without a release, it is possible the Ninth Circuit would find that the mental impressions of the attorneys are not at issue, except for those of counsel for United Fire who did assert an advice of counsel defense. Further, the Ninth Circuit will need to consider whether the letters High Country has offered into evidence simply state the public legal opinion of High Country, or if they contain

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<sup>66</sup> 2011 WL 3918597 (S.D. Fla. Sept. 6, 2011).

<sup>67</sup> *Id.* at 8.

<sup>68</sup> Petition for Writ of Mandamus, *supra* note 2, at 6.

attorney valuations that therefore waive privilege.<sup>69</sup> The Ninth Circuit must also determine whether High Country's actions in calling its attorneys as fact witnesses distinguishes this case from *Dion*.<sup>70</sup> This Court's holding in *Palmer* stated that calling an attorney as a fact witness is a distinction,<sup>71</sup> however, High Country has admitted letters that, depending on the Court's ruling on the above question, may negate this distinction.

In determining the answer to the second question, the Ninth Circuit will need to again consider whether the mental impressions of High Country's attorneys are directly at issue in this case in order to determine the relevance and need requirements for discovery of work product. If the Court determines that the mental impressions are not at issue, it is likely that work product would not be discoverable because the three requirements set forth in Rule 26(b)(3)(A) of the Federal Rules of Civil Procedure would not be met. However, if the Court does determine that the mental impressions are directly at issue, then both the attorney-client privilege, which also grants greater protection to opinion work product, and the ordinary work product protection, would likely be held to have been waived and therefore discoverable.

## V. CONCLUSION

The Court must further define what "directly at issue" means in the context of privilege and whether the mental impressions of the insured's attorneys are at issue in cases where the insured is disputing the decision of the insurer. If the Court determines that in disputing the actions of an insurer, an insured is putting the mental impressions of its attorneys directly at issue, this can have far reaching impacts on privilege generally, potentially decreasing the protection that the attorney-client privilege and work product doctrine provide. However, the ruling may also be narrowly construed, similar to the rulings that have held that utilizing an advice of counsel defense is always a waiver. If that is the case, then this ruling has the potential to clarify the boundaries of the attorney-client privilege and work product doctrine.

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<sup>69</sup> Plaintiff's Combined Brief, *supra* note 11, at 11–12.

<sup>70</sup> Defendant's Brief in Support of Motion to Compel, *supra* note 13, at 18; Plaintiff's Combined Brief, *supra* note 11, at 9–10.

<sup>71</sup> *Palmer*, 861 P.2d at 906.