

ALERT

# Insurer's Retention and Reliance On Outside Counsel In Handling Claim Does Not Negate Privilege and Work Product Protection

---

January 30, 2012

The United States District Court for the Southern District of Mississippi has held that an insurer did not waive the attorney-client privilege when, in response to questions posed by the insured, it stated it had relied on counsel in determining to deny coverage. The court further held that documents sought by the insured were created in anticipation of litigation and were protected by the work-product doctrine. *BancInsure, Inc. v. Peoples Bank of the South*, 2012 WL 139208 (S.D. Miss. Jan. 18, 2012).

Ruling on the insured's motion to compel discovery in a declaratory judgment action brought by the insurer, the court held that statements by the insurer indicating that outside counsel was involved in the determination to deny coverage did not waive the attorney-client privilege. The statements were made in response to questions from the insured and reliance on the advice of counsel was not raised as an affirmative defense to the counterclaim for bad faith denial of coverage. The court stated that "[t]he mere fact that an insurance company hires outside counsel to write a coverage opinion" and "relied on advice of counsel in denying" coverage "does not result in the waiver of the attorney-client privilege."

The court further held that withheld documents were protected by the work-product doctrine because they were produced in anticipation of litigation and not, as the insured contended, in the ordinary course of business. The court accepted the insurer's argument that it reasonably anticipated litigation because the same insured had sued it for denying coverage under similar circumstances, so the insurer reasonably anticipated that a denial of coverage in this matter would

## Practice Areas

---

D&O and Financial Institution Liability  
E&O for Lawyers, Accountants and Other Professionals  
Insurance  
Professional Liability Defense

lead to litigation. The insured failed to show a substantial need for the documents sufficient to overcome this protection.