IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CH PROPERTIES, INC., **Plaintiff,** **v.** FIRST AMERICAN TITLE INSURANCE COMPANY, **Defendant.**	**Civil No.** 13-1354 (FAB)

MEMORANDUM & ORDER[1]

BESOSA, District Judge.

After a good faith discovery effort and reviews of two previous privilege logs, the parties dispute ten documents in the defendant's second revised privilege log ("the Log").[2] (Docket No. 30-1; 32-1.) For the reasons explained below, the Court finds that document numbers 1, 2, and 3 are privileged pursuant to the attorney work product doctrine; that document numbers 5, 6, 7, and 8 are not privileged attorney-client communications; and that there is insufficient information to determine whether document numbers 4 and 10 are privileged attorney-client communications and whether document number 9 is privileged attorney work product.

[1] Ian Qua, a third-year student at The George Washington University Law School, assisted in the preparation of this memorandum and order.

[2] Throughout this memorandum and order, the Court will refer to the documents listed in the Log and produced to the Court for *in-camera* review as document number(s) 1-10. (Docket No. 32-1 at ¶¶ 1-10). See also (Docket No. 43-1 - 43-10); (Docket No. 49-1 - 49-3).

Accordingly, the Court **GRANTS in part** and **DENIES in part** FATIC's motion to compel and **ORDERS** FATIC to produce document numbers 5, 6, 7 and 8 to plaintiffs, and to provide the Court with the requested information necessary to determine whether document numbers 4, 9, and 10 are privileged.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case was originally in the Puerto Rico Court of First Instance, Carolina Superior Division, but it was removed to this Court. (Docket No. 1.) The case concerns a lease of a 5.0-cuerda track of land (the "Track") that has transferred between five entities since 1996. (Docket No. 1-1 at ¶¶ 3, 6-9.) On March 11, 1996, the Puerto Rico Recreational Development Company (predecessor of the Puerto Rico National Parks Co.) agreed to lease the Track to Desarrollos Hoteleros de Carolina, Inc. ("Desarrollos"). Id. at ¶ 3. On August 9, 1999, Desarrollos transferred the lease to Sunshine Isle, Inn, LLC ("Sunshine"). Id. at ¶ 6. A little over two years later, on August 21, 2001, Sunshine granted HR Properties, Inc. ("HR Properties") the right to acquire the lease. Id. at ¶ 7. On August 5, 2002, HR Properties assigned its leasing rights to plaintiff CH Properties, Inc. ("CH Properties"). Id. at ¶¶ 8-9.

When CH Properties acquired the leasing rights, on August 5, 2002, FirstBank granted it a loan and defendant First American Title Insurance Company ("FATIC") issued title insurance policies

to CH Properties and FirstBank. Id. at ¶¶ 10-14. FirstBank granted CH properties a loan for $6,750,000, which is guaranteed by the mortgage CH Properties took out on its leasing rights for $7,425,000. Id. at ¶¶ 10-11. FATIC insured (1) FirstBank the first-rank on the mortgage CH Properties took out on the lease (the "FirstBank Policy"), and (2) CH Properties the validity of its purchase of the leasing rights (the "Leasehold Owner's Title Insurance Policy[3]"). Id. at ¶¶ 13-14.

CH Properties brings this action against its insurer, FATIC, and alleges breach of contract and damages pursuant to the Leasehold Owner's Title Insurance Policy.[4] (Docket No. 1-1 at ¶¶ 14; 36-48.) CH Properties claims that FATIC breached the Leasehold Owner's Title Insurance Policy by denying their insurance claim for legal defense, coverage, and attorneys' fees in cases covered by the Leasehold Owner's Title Insurance Policy. (Docket No. 1-1 at ¶¶ 36-43.) CH Properties notified FATIC of its

[3] CH Properties argues it first learned of the Leasehold Owner's Title Insurance Policy during a deposition in the federal case on October 13, 2008. (Docket No. 1-1 at ¶ 30.) FATIC responds that it is standard operating procedure to deliver the title policy original to the insured on the mortgage loan closing date. (Docket No. 8 at ¶ 15.)

[4] CH Properties claims that the Leasehold Owner's Title Insurance Policy covers the damages it suffered, in the form of a decline in value of the lease and an inability to use the lease while paying leasing fees, mortgage interests, taxes, and other expenses, when, on August 5, 2002, members of the Comite de Vecinos de Isla Verde invaded the Track and prevented CH Properties from entering or using the Track. (Docket No. 1-1 at ¶¶ 19, 44-48.)

insurance claim for legal defense and attorneys' fees in a March 4, 2009 letter, pursuant to the Leasehold Owner's Title Insurance Policy.[5] (Docket No. 8 at ¶ 31.) CH Properties argues that FATIC owes CH Properties legal defense and attorneys' fees in one case filed in this Court, Chicago Title Ins. Co. v. Sunshine Isle Inn, 07-1190 (RLA) (the "Chicago Title case"), in which Chicago Title Insurance Co. filed a complaint against CH Properties and other entities on March 5, 2007. (Docket No. 1-1 at ¶ 27.) CH Properties also alleges that FATIC owes CH Properties attorneys' fees, from 2005 to 2009, in two consolidated Commonwealth of Puerto

[5] The Leasehold Owner's Title Insurance Policy states, in full:

> "SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A [August 5, 2002], against loss or damage, not exceeding the Amount of Insurance stated in Schedule A [$7,425,000.00], sustained or incurred by the insured by reason of:
>
> 1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
>
> 2. Any defect in or lien or encumbrance on the title;
>
> 3. Unmarketability of the title;
>
> 4. Lack of a right of access to and from the land; The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

(Docket No. 8-1 at p. 1.)

Rico cases (the "Commonwealth cases"): (1) Comite de Vecinos de Isla Verde v. HR Properties, FPE 2005-0268 (403), where the Comite de Vecinos de Isla Verde (Isla Verde Residents Committee) filed a complaint against CH Properties, FirstBank, and other entities on April 6, 2005 (Docket No. 1-1 at ¶ 19); and (2) Compañia de Parques Nacionales v. HR Properties, Inc., FAC 2005-0513 (403), where the Compañía de Parques Nacionales (National Parks Company) filed a complaint against CH Properties, FirstBank, and other entities on April 7, 2005. Id. at ¶ 23. On May 22, 2009, FATIC denied CH Properties' insurance claim for legal defense, coverage, and reimbursement of attorneys' fees in the Chicago Title case, denied CH Properties' claim for reimbursement of attorneys' fees in the Commonwealth cases from 2005 to 2009, and agreed to prospectively provide legal defense and coverage in the Commonwealth cases. (Docket No. 1-1 at ¶¶ 32-33.)

II. PRIVILEGE LOG BACKGROUND

CH Properties requests that the Court order FATIC to supplement the descriptions in the Log to allow CH Properties to make an informed assessment of the privilege claims. (Docket No. 30 at ¶ 2.) CH Properties also argues that, even if FATIC adequately asserts a *prima facie* privilege claim, the Court should conduct an *in-camera* review of the documents and that the burden is on FATIC to establish each element of the privilege. Id. at ¶ 3. Finally, CH Properties contends that public policy favors

disclosure of the documents because FATIC prepared them in the course of an insurance claim investigation.[6] Id. at ¶ 4. In response, FATIC argues that its descriptions are sufficient and that no document is part of CH Properties' insurance claim file; it agreed, however, to an *in-camera* inspection of the documents. (Docket No. 32 at pp. 1, 3.) FATIC attaches to its response a declaration by José Antonio Fernández-Jaquete, Esq., counsel to FATIC since the year 2000. (Docket No. 32-2.) CH Properties filed a surreply on April 21, 2014, reiterating the arguments in its initial motion and arguing that Federal Rule of Civil Procedure 26(b)(3) does not protect the documents because there is a substantial need for the materials and it is impossible to obtain a substantial equivalent by other means. (Docket No. 36 at ¶ 17.) On April 24, 2014, FATIC submitted the documents for *in-camera* review (Docket Nos. 43 - 43-10), and, on June 6, 2014, FATIC submitted certified translations of docket numbers 43-1, 43-2, and 43-10. (Docket Nos. 49-1 - 49-3.)

[6] CH Properties cites Ward v. Tribunal Superior, 101 D.P.R. 865, 869 (1974); Westhemeco Ltd. V. New Hampshire, 82 F.R.D. 702, 708-709 (S.D.N.Y. 1979); Atl. Coca-Cola Bottling Co. v. Transamerica Ins. Co., 61 F.R.D. 115, 188 (N.D.Ga. 1972); and Weitzman v. Blazing Pedals, Inc., 151 F.R.D. 125, 126 (D. Colo. 1993) for the proposition that public policy favors disclosure of reports and communications in an insurer's claim file, and that reports made by an insured in adjusting claims are made in the regular course of business and are not protected.

III. DISCUSSION

A. *Prima Facie* Privilege Claim

Federal Rule of Civil Procedure 26(b)(5)(A) provides that, in order to withhold information by claiming privilege, a party must expressly claim the privilege and sufficiently describe the documents so that the other parties can assess the claim. Upon review of the Log, the Court finds that defendant's descriptions easily satisfy Rule 26(b)'s requirements. FATIC expressly claims the privileges when it indicates the nature of privilege for all ten documents in the Log. See Baez-Eliza v. Instituto Psicoterapeutico, 275 F.R.D. 65, 70 (D.P.R. 2011) (Casellas, J.) ("Rule 26(b)(5)(A)(ii), which requires the filing of a privilege log"). FATIC sufficiently describes the documents by including the date, document type, author(s), recipient(s), and subject matter description for each document in the Log. See Vázquez-Fernández v. Cambridge Coll., Inc., 269 F.R.D. 150, 160 (D.P.R. 2010) (Arenas, J.) (holding that defendant satisfied Rule 26(b) through description: "[T]he three pages contained communications between the College's Co-Counsel . . . [and] the College's Director of Human Resources . . . [, were] made on October 5, 2009 and contained legal advice."). Thus, FATIC makes a *prima facie* privilege claim for all ten documents.

B. *In-Camera* Review

If a party claiming a privilege provides enough information for the Court to determine privilege and shows precise facts that support its claim of privilege, the Court may conduct an *in-camera* inspection of the disputed documents to decide which to withhold from disclosure. Kellogg USA, Inc. v. B. Fernández Hermanos, Inc., 269 F.R.D. 95, 99-100 (D.P.R. 2009) (McGiverin, J.) (citations omitted). A party can make this showing by filing briefs and affidavits. Id. FATIC has provided enough information to permit the Court to conduct an *in-camera* review because it filed a response in opposition to providing a third and more detailed privilege log, (Docket No. 32), and it attached a declaration by its counsel that further explains the privileges asserted in document numbers 1-3 and 9, (Docket No. 32-2).

C. Evidentiary Privileges

In the Log, the defendant claims the attorney work product privilege for document numbers 1-3 and 9 and claims the attorney-client privilege for document numbers 4-8 and 10. In a diversity action based solely on state law claims, state law governs a party's evidentiary privilege. Fed. R. Evid. 501; Gill v. Gulfstream Park Racing Ass'n., Inc., 399 F.3d 391, 401 (1st Cir. 2005) (citing 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2016, at 224 (2d ed. 1994)). CH Properties brings a breach of contract claim and a damages claim,

both based on Puerto Rico law. (Docket No. 1-1 at ¶¶ 36-48.) Pursuant to Federal Rule of Evidence 501, therefore, the scope of the attorney-client and work product evidentiary privileges claimed by FATIC are governed by Puerto Rico law. Fed. R. Evid. 501.[7]

1. Attorney-Client Privilege: Document Nos. 4-8 and 10

FATIC claims the attorney-client privilege for six documents in its privilege log: document numbers 4-8 and 10. In Puerto Rico, the attorney-client privilege is codified in Rule 503(b) of the Rules of Evidence. P.R. Laws Ann. tit. 32 Ap. VI, R. 503(b) (2013), *translated in* Exhibit 1[8] ("[T]he client, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and attorney."). Rule 503(b) codified the opinion in Upjohn Co. v. United States, 449 U.S. 383 (1981), and thus the contents of the opinion are applicable in Puerto Rico. Pagán Cartagena v. First Hosp. Panamericano, No. CC-2011-706, 2013 WL 5493552, at *10 n.9 (P.R. Sept. 19, 2013), *translated in*

[7] The Court notes both parties' erroneous reliance on federal privileges and their failure to set forth the scope of the attorney-client and work product privileges pursuant to Puerto Rico law, as required by Federal Rule of Evidence 501.

[8] The Court attaches to this memorandum and order, as Exhibit 1, a translation of "Rule 503 Attorney-Client Relationship."

Exhibit 2.[9] To invoke the Rule 503(b) attorney-client privilege successfully, a party must establish, by a preponderance of the evidence, that: "(1) a client - or his or her authorized representative - ; (2) made a confidential communication; (3) to his or her attorney; (4) for the purpose of securing legal advice." Pagán, 2013 WL 5493552, at *5 (citations omitted). Rule 503(a) defines the terms within this standard, including lawyer, client, authorized representative, and confidential communication. An authorized representative includes a person who "for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting within the scope of employment for the client." R. 503(a)(3). A client includes a person who "consults an attorney for the purpose of retaining the attorney or securing legal service or advice from him or her in his or her professional capacity." R. 503(a)(2). A confidential communication "takes place between a client and his/her attorney with regard to a professional function, based on an understanding that the information is confidential and will not be disclosed to third persons other than those to whom disclosure is necessary to accomplish the purposes for which it was intended" R. 503(a)(4). The privilege is interpreted restrictively in Puerto Rico. Pagán, 2013 WL 5493552, at *5. If the elements are established, the

[9] The Court attaches to this memorandum and order, as Exhibit 2, a translation of Pagán Cartagena.

document is privileged unless the party possessing the privilege renounces the privilege or an exception that limits the privilege applies. Id.

Document numbers 5-8, four fax sheets between an employee of the Title Security Group, Inc., Iliana Rivera, and FATIC's counsel, John LaJoie, Esq., are not privileged attorney-client communications. Document number 5 is from Iliana to John, on July 30, 2002, regarding Crowne Plaza/HR Properties, and requests approval of changes requested by "the client." Document number 6 is also from Iliana to John, on August 1, 2002, regarding Crowne Plaza Hotel & Casino. Iliana asks John to look at page five of an attached deed, asks whether FATIC objects to assigning the lease by letter, and asks whether Title Security Group, Inc. is issuing a leasehold policy the next morning for $2,900,000. Document number 7 is also from Iliana to John, on August 2, 2002 at 3:08 p.m., regarding Crowne Plaza Hotel & Casino. Iliana asks whether Title Security Group, Inc. can issue an endorsement for an owner's policy that provides the same affirmative coverage endorsement given to the lender (mortgage for $27,846,000); asks whether Title Security Group, Inc. should charge; and asks how much it should charge. Document number 7 also references an attachment — the title search detailing restrictive covenants on page two item a. Id. Document number 8 is a fax from John to Iliana on August 2, 2002 at 4:09 p.m. It is a copy of Iliana's previous fax,

document number 6, but it includes John's notes indicating the endorsement is ok for the owner's policy and that Title Security Group, Inc. should charge 10% as the premium, if possible. Document numbers 4-8 all concern the process of issuing an insurance policy. There is no motivation to obtain legal assistance; as a result, the documents are not privileged attorney-client communications. See generally Finova Cap. Corp. v. Lawrence, No. 3-99-CV-2552-M, 2001 U.S. Dist. LEXIS 2087, at *5 (N.D. Tex. Feb. 23, 2001) (holding that documents relating to insurance issues clearly were not privileged).

The Court does not have enough information to determine whether document numbers 4 and 10 are privileged attorney-client communications. Document number 4 is a cover sheet of a fax from FATIC's counsel, Mr. Fernandez-Jaquete, to Caroline Leon-Velazco, Esq. on July 20, 2005. Document number 10 is a redacted portion of an e-mail on January 31, 2011 from FATIC's counsel, Mr. Fernandez-Jaquete, to Ms. Velazco. It contains a proposed response to CH Properties' attorney Eduardo Ferrer regarding the federal action. Defendant must indicate the titles and responsibilities of Mr. Fernandez-Jaquete and Ms. Velazco, as well as the relationship between their respective entities, in order for the Court to determine the existence of an attorney-client relationship in document number 4.

2. Work Product Privilege: Document Nos. 1-3 and 9

FATIC claims the work product privilege for document numbers 1-3 and 9. In Puerto Rico, the work product privilege is codified in Rule of Civil Procedure 23.1 ("Rule 23.1"): "Mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning a litigation shall be protected against disclosure." P.R. Laws Ann. tit. 32, Ap. III, Rule 23.1 (2010). See also Ades v. Zalman, 115 D.P.R. 514, 525 n.3 (1984) (citing State *ex rel* Dudek v. Circuit Court for Milwaukee Cnty., 150 N.W.2d 387, 404 (Wis. 1967)) ("'[A] lawyer's work product consists of the information he has assembled and the mental impressions, the legal theories and strategies that he has pursued or adopted as derived from interviews, statements, memoranda, correspondence, briefs, legal and factual research, . . . , personal beliefs, and other tangible or intangible means."). Rule 23.1(b) corresponds to the federal work-product privilege, codified in Federal Rule of Civil Procedure 26(b)(3) ("Rule 26(b)(3)"). Aponte-Rivera v. Sears Roebuck, Inc., 129 D.P.R. 1042, 1054 (1992).[10] Rule 23.1, however, does not contain Rule 26(b)(3)'s provision allowing materials to be discovered if "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their

[10] The Court attaches to this memorandum and order, as Exhibit 3, a translation of Aponte-Rivera.

substantial equivalent by other means." 28 U.S.C. § 26(b)(3)(A)(ii); P.R. Laws Ann. tit. 32 Ap. III, Rule 23.1; Aponte-Rivera, 129 D.P.R. at 1054. Both Rule 23.1 and Rule 26(b)(3) do, however, exclude documents made in the ordinary course of business. López Reyes v. Rodríguez Torres, Cases Nos. DDP 2011-0053; DDP 2011-0741, 2012 WL 6561132, at *8 (P.R. Ct. App. Nov. 13, 2012).[11]

Document numbers 1 and 2 — notes written by FATIC's counsel, Mr. Fernandez-Jaquete, in regard to a summary and a time line of the state and federal actions — are privileged attorney work product. Mr. Fernandez-Jaquete certifies that these documents were created in anticipation of litigation, in July 2005, after FATIC had received FirstBank's insurance claim letter seeking legal defense in the Commonwealth case. (Docket No. 32-2 at ¶ 5.) After an *in-camera* review, it is clear that the summary, time line, and notes in document numbers 1 and 2 are information FATIC's counsel has assembled and include his mental impressions; as a result, the documents are privileged attorney work product. P.R. Laws Ann. tit. 32, Ap. III, Rule 23.1.

Document number 3 — a June 5, 2009 letter from Jose A. Andreu-Fuentes to FATIC's counsel, Mr. Fernandez-Jaquete, containing notes in the margin written by Mr. Fernandez-Jaquete

[11] The Court attaches to this memorandum and order, as Exhibit 4, a translation of Lopez Reyes.

while reviewing the letter — is also privileged attorney work product. Mr. Fernandez-Jaquete certifies that the margin notes in document number 3 are mental impressions and legal analysis in anticipation of CH Properties' claim for legal defense and coverage in the Chicago Title case and Commonwealth cases. Id. at ¶ 7. This exchange occurred after FATIC denied CH Properties defense, coverage, and attorneys' fees in the state and federal actions on May 22, 2009. The notes are counsel's opinion about a letter directly related to the current litigation, and as a result the document is privileged attorney work product. P.R. Laws Ann. tit. 32, Ap. III, Rule 23.1.

The Court does not have enough information to determine whether document number 9 is privileged attorney work product. Mr. Fernandez-Jaquete certifies that document number 9 is a working draft of a letter he prepared in anticipation of litigation regarding FirstBank's claim, and that the letter informed FirstBank's in-house counsel, Laura Escalante-Facundo, Esq., that FATIC agreed to provide legal defense for FirstBank in the Commonwealth case subject to a reservation of rights. Id. at ¶ 6. Plaintiff must indicate the titles and responsibilities of Mr. Fernandez-Jaquete and Ms. Escalante-Facundo and the relationships of their respective clients in order for the Court to be able to determine whether document number 9 is privileged attorney work product.

IV. CONCLUSION

For the reasons explained above, the Court finds that document numbers 1, 2, and 3 are privileged attorney work product; that document numbers 5, 6, 7, and 8 are not privileged attorney-client communications; and that there is insufficient information to determine whether document numbers 4 and 10 are privileged attorney-client communications and whether document number 9 is privileged attorney work product. Accordingly, the Court **GRANTS in part** and **DENIES in part** FATIC's motion to compel and **ORDERS** FATIC to provide documents 5, 6, 7, and 8 to plaintiffs, and to provide the Court with the requested information regarding the authors of document numbers 4, 9, and 10 to determine if the documents are privileged.

IT IS SO ORDERED.

San Juan, Puerto Rico, July 2, 2014.

s/ Francisco A. Besosa
FRANCISCO A. BESOSA
UNITED STATES DISTRICT JUDGE

RULE 503 ATTORNEY-CLIENT RELATIONSHIP

(a) As used in this rule, the following terms shall have the meaning indicated below:

(1) *Attorney*: A person authorized or reasonably believed by the client to be authorized to practice law in Puerto Rico or in any other jurisdiction. This includes his/her associates, aides, and employees.

(2) *Client*: A natural or artificial person who, directly or through an authorized representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from him or her in his or her professional capacity. This includes an incompetent who consults the attorney directly or whose guardian so consults the attorney in behalf of the incompetent.

(3) *Authorized representative*: A person having authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting within the scope of employment for the client.

(4) *Confidential communication*: The communication that takes place between a client and his/her attorney with regard to a professional function, based on an understanding that the information is confidential and will not be disclosed to third persons other than those to whom disclosure is necessary to accomplish the purposes for which it was intended.

(b) Subject to the provisions of this rule, the client, whether or not a party to the action, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and attorney. The privilege may be claimed not only by the holder of the privilege—who is the client—but also by a person who is authorized to do so in behalf of the client or by the attorney who received the communication if the privilege is claimed in the interest and behalf of the client.

(c) There is no privilege under this rule if:

(1) The services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud.

(2) The communication is relevant to an issue between the heirs of a deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction.

(3) The communication is relevant to an issue concerning a breach of the mutual duties arising from the attorney-client relationship.

(4) The communication is relevant to an issue concerning a document attested to by the attorney in his or her capacity as notary public.

(5) The communication is relevant to a matter of common interest between or among two or more clients of an attorney, in which case none of them may claim a privilege under this rule against the others.

Commentators, resting on Professor Wigmore's definition, have concluded that **however the definition of attorney-client privilege is phrased, its content is reduced to protecting the confidential communication made by a client or his or her authorized representative to an attorney in order to obtain legal counsel**. *See,* Edna Selan Epstein & Michael M. Martin, *supra*, at 14; *Weinstein's Federal Evidence*, *supra*, § 503.10. **These are the essential elements that the holder of the attorney-client privilege—which is absolute in nature—must prove by a preponderance of the evidence in order to establish that there is a prima facie case on which the attorney-client privilege attaches**. *The New Wigmore: A Treatise on Evidence: Evidentiary Privileges*, supra, § 6.3, at 588. In that case, the holder will prevail in the claim that said communication not be disclosed and admitted as evidence in a legal proceeding. *Id*.

***6** Having established the foregoing, **the applicability of the privilege shall only be defeated if one of the following conditions is met: (1) that the privilege holder waives the same, or (2) that any of the exceptions that limit the scope of a probative privilege apply.** *Id*. Contrariwise, if the elements of a prima facie case are not established, then we may not talk about waiver of a privilege or the applicability of an exception thereto.

Our Evidence Rules agree with this approach. Thus, Rule 503(a) provides clear definitions to the terms *attorney*, *client*, *authorized representative* and *confidential communication*, for these constitute the minimum content of a prima facie case in order to invoke the attorney-client privilege. Furthermore, our legal system also recognizes the possibility that one of the parties may expressly or impliedly waive an evidentiary privilege (32 L.P.R.A. App. VI, R. 517), or that the privilege does not attach because of one of the exceptions provided in our Evidence Rule 503(c) (32 L.P.R.A. App. VI, R. 503(c)).

. . . .

***10** With this Opinion in mind, in 2009 we adopted our Evidence Rule 503. In its adoption, we explicitly codified what was held in *Upjohn Co. v. U.S.*[9] For this reason, we added the definition of the term *authorized representative*, upon agreeing with the criteria of the

[9] In view that the decision of the federal Supreme Court in *Upjohn Co. v. U.S.*, is not based on constitutional grounds, it is not binding on the states and territories of the United States of America. 1 *McCormick on Evidence, supra* §87.1 at 393. However, our codification of that case in our Evidence Rule 503 shows a manifest intent of making its provisions applicable in our legal jurisdiction.

Federal Supreme Court, insofar as the attorney-client privilege "extends to conversations between the attorney and the representatives and employees" of the corporation, "if said communications are relevant to render legal advice to the client." *Informe de las Reglas de Derecho Probatorio*, *supra*, at 227-228. *See also* Rolando Emmanuelli Jiménez, *Prontuario de derecho probatorio puertorriqueño*, *supra*, at 267.

Professor Ernesto Chiesa confirms the above. Thus, he remarks that our Rule 503(a), in defining the term *authorized representative*, adopted "an extensive construction of the term '*client*,' compatible with the decision in *Upjohn v. U.S.*, [*supra*], in regard to the scope of the term '*client*' when it refers to a corporation." Ernesto Luis Chiesa, *Reglas de Evidencia de Puerto Rico 2009: Análisis por el Prof. Ernesto L. Chiesa*, *supra*, at 151. As a result, "[f]or the communication to be privileged, it does not have to be between the attorney and the high spheres of the corporation. It suffices that the communication be with a person who has the information that is important for the counsel." *Id*.

In light of the foregoing, and in sum, we can conclude that, given our express codification of *Upjohn Co. v. U.S.*, in our Rule 503(a), **the control group test does not apply to Puerto Rico**. Consequently, the attorney-client privilege is not limited to communications made by the officials and employees of the highest spheres of the corporation in charge of designing the corporative policy. On the contrary, today we adopt the standard suggested in the cited federal case, which is similar to the subject matter test. Therefore, **an employee will be an *authorized representative* of the client (the corporation), provided: (1) their communications were offered to the corporate attorney for the express purpose of securing legal counsel for the corporation; (2) the communications were related to the employee's specific corporate functions and tasks, and that he or she was aware that he or she was being questioned by the attorney so that the corporation could obtain legal advise, and (3) their communications were treated as confidential by the corporation, as instructed by the corporation's managers.**

When we expressly adopted the cited test, we aimed to comply with the text of our Rule 503(a), which defines the term *client* as an artificial person who establishes a confidential communication with its attorney through its *authorized representative*. Likewise, we honored the letter of our Rule 503(a), which defines the term *authorized representative*, in pertinent part, as a person who, "**for the purpose of effectuating legal representation for the *client*** [(the

corporation)]**,** makes or receives **a confidential communication while acting within the scope of employment for the client.**" (Emphasis added.)

. . . .

B.

As we stated before, in order for the attorney-client privilege to attach with regard to a certain communication, the one invoking the privilege must prove, among other factors, that the communications was made *confidentially*. *Ortiz v. Meléndez*, at 28 ("The exclusion of evidence based on privileges responds to the 'confidentiality… to protect the holder of the privilege.'"). Our Rule 503(a)(4) defines the term *confidential communication* as "[t]he communication that takes place between a client and his/her attorney with regard to a professional function, **based on an understanding that the information is confidential and will not be disclosed to third persons other than those to whom disclosure is necessary to accomplish the purposes for which it was intended**." 32 L.P.R.A. App. VI, R. 503 (a)(4). (Emphasis added.)

Thus, the above-cited definition illustrates certain elements indispensable for a communication to be considered confidential, that is: (1) that a communication occur between the attorney and the client; (2) whose content is related to a professional transaction (that is, that it constitute counseling on a legal matter); (3) that the communication be disclosed under the belief or reasonable trust that it will not be disclosed to third parties; (4) other than those who need the information to give or receive the most capable legal counsel. See Ernesto Luis Chiesa, *Reglas de Evidencia de Puerto Rico 2009: Análisis por el Prof. Ernesto L. Chiesa*, *supra*, at 151; Ronaldo Emmanuelli Jiménez, *Prontuario de derecho probatorio puertorriqueño*, *supra*, at 267.

. . . .

As we explained before, the attorney-client privilege prevents the disclosure of a communication between a client and his or her attorney, provided that whoever invokes the probative privilege establishes, by a preponderance of the evidence, that: (1) a client—or his or her authorized representative—; (2) made a confidential communication; (3) to his or her attorney; (4) for the purpose of securing legal advice.

[14-16] Although Civil Procedure Rule 23.1 (b), *supra*¸ adopted in 1979, corresponds to Federal Civil Procedure Rule 26 (b) (3), 28 U.S.C., the local version left out the requirement that calls for "a showing that the party seeking discovery has substantial need for the materials in the preparation of the party's case and that the party is unable, without undue hardship, to obtain their substantial equivalent by other means." However, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

CERTIFIED TRANSLATION

E. LÓPEZ-REYES v. I. RODRÍGUEZ-TORRES

COURT OF APPEALS

Nov. 13, 2012.

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III

—Work Product Privilege—

The 2009 Rules of Civil Procedure, 32 L.P.R.A. App. V, state, regarding the scope of discovery, that:

(a) In general.—Parties may perform discovery on any non-privileged matter that is pertinent to the issue at hand in a pending case, whether it refers to a claim or a defense by any other party, including the existence, description, nature, custody, condition, and location of any book, electronically-stored information, document or other tangible object, and the identity and addresses of persons with knowledge of pertinent facts. The fact that the information requested is inadmissible at trial shall not constitute grounds for objection, as long as there exists a reasonable probability that said information will lead to the discovery of admissible evidence.

***5** *(b) Documents, objects, and other evidence obtained in preparation for trial.*—Subject to the provisions of subsection (c) of this rule, a party may perform discovery of documents and objects prepared, prior to litigation or for trial, for or by another party, or

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for or by a representative of said party, including its attorney, consultant, surety, insurer or agent. The mental impressions, conclusions, opinions or legal theories on the case, of the party's attorney or any other representative, shall be deemed beyond the scope of discovery. One party may require from another a list of the witnesses that the requested party intends to use at trial, as well as a brief summary of their intended testimony. A party may also request from any other party the production of copies of all witness statements in the latter's possession. Likewise, parties as well as witnesses may obtain copies of any statement they have given previously. For the purposes of this rule, a statement written, signed or approved by the person who gave it, or any type of recording of a statement or transcript of same. [*sic*] [...] Rule 23.1, 32 L.P.R.A. App. V, R. 23.1.

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As it is known, privileges arise from the Constitution, the law, the Rules of Evidence or special laws. The Constitution, on the one hand, can create privileges, such as that deriving from the right against self-incrimination. On the other hand, the Constitution may limit—and even suppress—the scope of a privilege when its application is at odds with a fundamental right. *Pueblo v. Fernández-Rodríguez*, Opinion dated December 9, 2011, 2011 T.S.P.R. 188, 2011 J.T.S. 193, citing E.L. Chiesa-Aponte, *Tratado de Derecho Probatorio*, Publicaciones JTS, Volume I, 2005.

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***6** The Supreme Court has stated that evidentiary privileges seek to advance social values and interests that, due to considerations of public policy, are understood to be superior to the search for truth. The traditional foundation is utilitarian. In other words, "sacrificing evidence with clear probationary value is felt to be justified if it advances a significant public interest... The higher the public interest advanced by the privilege, the broader the scope of said privilege and fewer its exceptions. Ibid.

Likewise, it has stated that privileges, by their nature and function, prevent discovery of certain acts, facts or communications because there exist conflicting interests that intervene with the exhaustive search for truth. It is for that reason that the privileges found in the Rules of Evidence are interpreted restrictively. Hence, the grounds for privilege are entirely independent of the search for truth. That is to say, matters of privilege are excluded for public policy reasons and considerations, so as to advance social interests and values that are antagonistic and unrelated to the search for truth, which is so fundamental to the fair adjudication of judicial controversy. *Pueblo v. Fernández-Rodríguez, supra*; *Ortiz-García v. Meléndez-Lago*, 164 D.P.R. 16 (2005).

On the work product doctrine specifically, the Supreme Court has stated that [the doctrine] establishes that attorneys' mental impressions, conclusions, opinions or legal theories of a case are exempt from being revealed to the other party. *S.L.G. Font Bardon v. Mini-Warehouse*, 179 D.P.R. 322 (2012); *Ades v. Zolman*, 115 D.P.R. 514, 525 (1984).

It is pertinent to the issue at hand to point out that, under the earlier rules of civil procedure, the Supreme Court ruled in *Ward v. Tribunal Superior,* 101 D.P.R. 865 (1974), "[h]aving a plaintiff requested, through interrogatories, copy of an accident report issued by defendant insurer to its insurance company, the latter is obligated to provide said copy." It clarified that "[c]ommunication between an insured and his or her insurer is not privileged or secret." Ibid.

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The Supreme Court stated that "we do not see how it can benefit the administration of justice to find secret a document (the report by the insured) written contemporaneously to the facts of the case, when they were fresh in his or her mind, and which has a greater likelihood of sincerity than one prepared months later for the purpose of litigation." Ibid. In light of this, and after considering even U.S. references, [the Supreme Court] concluded that "the report rendered by the insured through the insurance company's adjuster is not a privileged communication." Likewise, "statements of witnesses, reports, memoranda, and other writings taken by or in the custody of the insurance company are subject to discovery." Ibid. This case, although decided under the previous rule structure, has not been reversed by our Supreme Court.

***7** In this regard, J. Cuevas-Segarra has pointed out, in his Tratado de Derecho Procesal Civil, Volume I, San Juan, Publicaciones J.T.S., 2000, page 477, that "the only aspect

that is not discoverable is the adjuster's mental impression or conclusions, as claims investigators and agents are considered to be included within the term party representative."

On the other hand, for purposes of persuasion, we referred also to U.S. case law in the interest of educating ourselves on the work product privilege and that of documents produced in the course of business. In *U.S. v. Textron Inc.*, 577 F.3d 21 (2009), the 1st Circuit Court of Appeals held that the work product privilege did not apply to documents prepared in the ordinary course of business or prepared in an essentially similar manner, irrespective of litigation. Pursuant to Rule 26(b)(3) of Federal Rules of Civil Procedure,[FN1] privilege extended to the documents prepared in anticipation of litigation o for litigation. Ibid.

> FN1. Currently, the mentioned Rule 26(b)(3) of the Federal Rules of Civil Procedure, Fed. R. Civ. Proc. Rule 26(b)(3), 28 U.S.C.A., states that:
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> (3) *Trial Preparation: Materials.*
>
> (A) *Documents and Tangible Things.*
>
> —Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

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(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.*—If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

...

Now then, it pointed out that *"[i]t is not enough to trigger work product protection that the subject matter of a document relates to a subject that might conceivably be litigated*." Ibid. Likewise, *"[w]ork product does not extend to documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation."* Ibid.

Likewise, the Federal Court of Appeals for the 6th Circuit resolved in *U.S. v. Roxworthy*, 457 F.3d 590 (2006), that *"[a] party asserting the work product privilege bears the burden of establishing that the documents he or she seeks to protect were prepared in anticipation of litigation."* It defined *"in anticipation of litigation"* as *"whether a document was prepared or obtained because of the prospect litigation."* Ibid.

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The mentioned Federal Court stated that Rule 26(b)(3) of the Federal Rules of Civil Procedure establishes that *"other documents prepared in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes, are not covered by the work product privilege."* Ibid. *"The key issue in determining whether a document should be withheld is the function that the document serves."* Ibid. *"[R]egardless of the content, determining the driving force behind the preparation of each requested document is therefore required in resolving a work product immunity question."* Ibid.

"[A] document will not be protected if it would have been prepared in substantially the same manner irrespective of the anticipated litigation." Ibid.; *U.S. v. Adlam (Adlam II)* , 134 F.3d 1194 (2d Cir. l998). *"[A] party must have had a subjective belief that litigation was a real possibility and that belief must have been objectively reasonable." U.S. v. Roxworthy, supra; In re Sealed Case*, 146 F.3d 881 (D.C. Cir. l998).

IV

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Rule 23.1 of the 2009 Rules of Civil Procedure, *supra*, clearly states that discovery may be performed on any non-privileged matter pertinent to the issue. Except, of course, for the mental impressions, conclusions, opinions or legal theories of the case of the attorney or any other representative of a party; that is, the work product privilege.

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Then again, as we have already indicated in the discussion of applicable law, this privilege does not extend to documents prepared in the ordinary course of business.

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