A·D·C VERITAS
Association of Defense Counsel of Northern California and Nevada

ASCDC
Association of Southern California Defense Counsel

November 7, 2017

Presiding Justice Arthur Gilbert
and Associate Justices
California Court of Appeal
Second District, Division Six
200 East Santa Clara Street
Ventura, California 93001

Re: ***James River Insurance Co. v. Superior Court,*** **2d Civil No. B285302**
Request of amicus curiae for consideration on the merits

Honorable Justices:

On behalf of the Association of Southern California Defense Counsel (ASCDC) and the Association of Defense Counsel of Northern California and Nevada (ADCNCN), as amicus curiae (the Associations), we ask the Court to issue an alternative writ or an order to show cause and address the pending writ petition on its merits. To the extent necessary, we ask the Court to treat this letter as a formal application to file the letter as an amicus brief.

We do not support either side. Rather, we urge the Court to decide the petition on its merits because it squarely presents an important question about the attorney-client privilege and work product doctrine in the context of the common interest doctrine—that is, where protected information is shared with third parties to further the parties' mutual interests. As we explain below, the case law provides no guidance on how to apply this doctrine in litigation that involves multiple insurers and other parties whose interests and alignments may shift over the course of the litigation. Lawyers and parties need clarity as to how the common interest doctrine works in this context.

Authority for permitting this amicus letter

Rule 8.487 of the California Rules of Court was revised effective January 1, 2017 to expressly permit the filing of amicus briefs after an appellate court issues an alternative writ or order to show cause. (Cal. Rules of Court, rule 8.487(e)(1).) The Judicial Council's Advisory Committee Comment to Rule 8.487 makes clear that amicus letters are also permissible before a court issues an alternative writ or order to show cause:

> "Subdivisions (d) and (e). These provisions do not alter the court's authority to request or permit the filing of amicus briefs or amicus letters in writ proceedings

> in circumstances not covered by these subdivisions, *such as before the court has determined whether to issue an alternative writ or order to show cause* or when it notifies the parties that it is considering issuing a peremptory writ in the first instance." (Italics added.)

Indeed, Division Seven has stated in a published opinion that the filing of amicus letters in connection with a writ petition was one factor the court considered in deciding whether to issue an order to show cause. (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 557-558 [Second Dist., Div. Seven; noting that amicus letters were filed in support of a writ petition and that "based on the amici curiae submissions we have received" the matter "appears to be of widespread interest" such that writ review was appropriate]; see also *Los Angeles County Bd. of Supervisors v. Superior Court County* (2015) 235 Cal.App.4th 1154 [Second Dist., Div. Three; "The Association of Southern California Defense Counsel, as amicus curiae, filed a letter in support of issuance of the writ"], rev'd (2016) 2 Cal.5th 282.)

Therefore, we ask the Court to consider this amicus letter in deciding the threshold issue of whether to issue an alternative writ or order to show cause so that the court can address the petition on its merits.

Interest of amicus curiae

ASCDC is the nation's largest and preeminent regional organization of lawyers devoted to defending civil actions, comprising approximately 1,100 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts in addressing legal issues of interest to its members and the public. It has appeared as amicus curiae in numerous cases involving the attorney-client and work product privileges (see, e.g., *Coito v. Superior Court* (2012) 54 Cal.4th 480 and *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725), including most recently before the California Supreme Court in *Los Angeles County Board of Supervisors v. Superior Court*, *supra*, 2 Cal.5th 282.

ADCNCN is an association of approximately 900 attorneys primarily engaged in the defense of civil actions. Its Nevada members are interested in the development of California law because Nevada courts often follow California law. ADCNCN has appeared as amicus curiae in numerous cases before the California Supreme Court and Courts of Appeal across the state. Its members have a strong interest in the application of the attorney-client and work product privileges.

The two Associations are separate organizations, with separate memberships and governing boards. They coordinate from time to time on matters of shared interest, such as this letter. Their memberships have a shared interest in this petition because defense attorneys often must communicate with individuals or entities who have a common interest with the attorney's client, particularly where insurance carriers are involved. The

Associations' members are routinely retained by insurance carriers to defend a party, and countless cases involve multiple parties, multiple primary carriers, and multiple excess and other carriers. It is crucial to defense attorneys that the parameters of the "common interest" doctrine be clear, so they can differentiate in advance between disclosures that the attorney-client privilege and work product doctrine will protect and those that may waive their protection.

Background

James River is the primary insurance carrier of Golden State Water (GSW). There were communications among James River, GSW and Aon, GSW's insurance broker. Mr. Hafey, James River's coverage counsel, attested that the purpose of communications with Aon was to get GSW's excess carrier, Starr Indemnity, to participate in resolving claims against GSW. (Petitioner's Appendix ("Appen."), Vol. 1, pp. 87-89.)

Starr Indemnity sought production of these communications, arguing that any confidentiality was waived by disclosure to Aon, a non-client third party. James River resisted, relying on the common interest doctrine. A leading case states that a party resisting disclosure "in the context of communications among parties with common interests" must meet two tests: "[I]t is essential that participants in an exchange have a reasonable expectation that information disclosed will remain confidential . . . [and] disclosure of the information must be reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted." (*OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 891 (*OXY Resources*).)

James River argued that from its perspective, at this stage of the claims process Aon was its and GSW's ally, Starr Indemnity was adverse, and James River expected that Aon would preserve the confidentiality of its communications with Aon. (E.g., Appen., Vol. 1, pp. 42, 88-89.) There is no evidence that Aon ever disclosed any of the communications. The trial court found this insufficient: "The Court finds that James River fails to establish requirement #(1) [of the common interest doctrine] because it failed to submit evidence indicating it had an objectively reasonable expectation that Aon would keep the subject communications confidential. Further, James River has not established requirement #(3) because it failed to submit evidence that the disclosure was reasonably necessary to accomplish the purpose for which James River sought legal advice from its coverage counsel." (Appen., Vol. 4, p. 907.)

As in the trial court, in the petition and opposition the parties differ on what kind of evidence satisfies these requirements.

James River urges that the trial court applied the wrong standard by requiring "an objectivelv reasonable expectation" of confidentiality. (Petition, p. 43 et seq.) According to the petition, the standard is the discloser's *subjective* belief. (*Ibid*.)

Starr Indemnity contends that subjective intent, standing alone, is not enough—"courts necessarily look to and evaluate the totality of the circumstances surrounding the third party disclosure to determine the 'reasonableness' of the disclosing party's subjective intent." (Opposition, p. 25.) However, Starr Indemnity appears to argue that to be reasonable, an expectation of confidentiality requires some expression of intent *by the third party*. (E.g., Opposition, pp. 29-34 [James River did not prove that Aon had a view about confidentiality, and in discovery Aon took no position regarding confidentiality].) Starr recognizes that certain kinds of relationships support an expectation of confidentiality. (See Opposition, p. 27, citing *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582, 588 (*Cooke*) [affirming trial court finding of no waiver by disclosure to "members of (the discloser's) family or business associates"].) But it assumes that the relationship in *this* case—among an insurer, its insured, and its insured's broker—isn't enough.

The issue presented.

The petition does not separately state an issue for consideration, although it focuses on the relevance of the disclosing party's subjective belief.

The Associations believe that the petition presents, and the Court should address, a broader issue concerning the common interest doctrine:

> When an insurance carrier communicates to its insured and the insured's agent or broker concerning how to involve another carrier in indemnifying or defending a pending claim, does the relationship among the parties presumptively create a reasonable expectation of confidentiality?

Why the Court should consider the issue.

We have not found any California appellate decision addressing how the common interest doctrine works in the context of insurance relationships, particularly the relationships among primary and excess or other insurers. As this case demonstrates, those relationships are not simple, and they present risks for the protection of confidential information. So, this is an important issue of first impression, worthy of writ review.

What happened here is not uncommon. At bottom, it is a coverage dispute. But it is multi-faceted, because Starr Indemnity's claim that James River has not exhausted its policy limits can be seen as a challenge by Starr Indemnity to the insured's coverage under Starr Indemnity's excess policy.

The situation is not as simple as Starr Indemnity contends when it says that "(1) JR [James River], GSW and Starr all had a 'common interest' in minimizing GSW's financial exposure to [the plaintiff's] claims; and (2) JR shared GSW's good faith duties towards Starr with respect to JR's handling of those third party claims." (Opposition,

p. 30.) These statements might well describe the situation down the road, after resolution of the current dispute between James River and Starr Indemnity. But in the situation that gave rise to this petition, Starr Indemnity was adverse to both James River and GSW—it was refusing to pay third-party claims (adverse to GSW's interests), and demanding that James River pay more than the $1 million it had already paid (adverse to James River).

James River oversimplifies the case as well. While certainly a disclosing party's state of mind matters—he or she must honestly believe that a disclosed communication will be held in confidence—a court cannot properly consider that belief in a vacuum.

The Court should grant writ review to consider whether the relationship among the parties at the time of the disclosure can, in the absence of contrary evidence—that is, presumptively—fill this vacuum, so as to shift to the party seeking disclosure the burden of demonstrating that the disclosing party's belief was not reasonable.

As noted above, some kinds of relationships apparently do meet this test. (*Cooke, supra*, 83 Cal.App.3d at p. 588 [family members and business associates], cited at Opposition, p. 27.) And the relationship in this case certainly would qualify if the party seeking discovery were the plaintiff in the underlying case rather than the excess carrier: It would be entirely reasonable to assume that Aon would never divulge *to the plaintiff* communications among Aon, the insured, and one of the insured's carriers.

It is just as clear that in some relationships, there *cannot* be a reasonable expectation of confidentiality. This was the case in *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889 (*Citizens for Ceres*). There, a city and a developer made concerted efforts to preserve confidentiality during an environmental review process, but the court essentially found that a conflict between their interests at that stage of the process barred application of the common interest doctrine. (*Id*. at pp. 917-919.)

It is true that the present case lacks the kind of express commitment to confidentiality that existed in cases like *Citizens for Ceres*, *supra*, 217 Cal.App.4th at p. 900 (city and developer deliberately communicated through counsel in order to shield communications) and *Oxy Resources*, *supra*, 115 Cal.App.4th at p. 881 (elaborate written "Joint Defense Agreement"). But, as the court observed in *OXY Resources*, "[a] common interest agreement, such as the Joint Defense Agreement, strengthens the case against waiver, but such an agreement is neither a requirement nor a guarantee." (*Id*. at p. 892.) As another court observed, "there is no talismanic method by which parties must prove that a common interest exists so as to eliminate the waiver otherwise created by a third-party disclosure." (*Roush v. Seagate Technology, LLC* (2007) 150 Cal.App.4th 210, 225.)

That is why parties and their attorneys need guidance about the role that relationships play, particularly in an area as complex as insurance-defended litigation,

where carriers and insureds can have both adverse and common interests. In the real world, there are many situations in which it never occurs to lawyers that they must negotiate elaborate confidentiality agreements in order to serve their clients' interests, among other reasons because the relationship of the parties itself creates an expectation of confidentiality. Without guidance from the courts, this area will remain fraught with the risk of unintended waiver, as determined after the fact and after the opportunity to guard against waiver has been lost.

While no single decision can address every possible relationship, the law on this topic is unusually sparse and will benefit from each decision. The Court should grant writ review to consider whether there are categories of relationships in which the relationship itself is sufficient, at least in the absence of contrary evidence, to establish a reasonable expectation of confidentiality.

The Associations respectfully submit that this is an issue of public importance that warrants considered appellate review, with the opportunity for full briefing and oral argument. Accordingly, they ask the Court to issue an alternative writ or order to show cause, and to address the petition on the merits.

Respectfully submitted,

RYAN & LIFTER

By /s/ Jill J. Lifter

On Behalf of the Association of Defense Counsel of Northern California and Nevada

GREINES, MARTIN, STEIN & RICHLAND LLP

By /s/ Edward L. Xanders

On Behalf of the Association of Southern California Defense Counsel

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On November 7, 2017, I served the foregoing document described as: **Amicus Letter** on the parties in this action by serving:

SEE ATTACHED SERVICE LIST

(X) By Envelope: by placing a true copy thereof enclosed in sealed envelopes addressed as above and delivering such envelopes:

(X) By Mail: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

(X) I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system. Participants in the case who are not registered TrueFiling users will be served by mail or by other means permitted by the court rules.

Executed on November 7, 2017, at Los Angeles, California.

(X) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

/s/ Leslie Barela

Leslie Y. Barela

Via Truefiling:

Matthew Joseph Hafey
Jonathan B. Cole
Victoria Labrie
Nemecek & Cole
15260 Ventura Blvd., Suite 920
Sherman Oaks, CA 91403-5344

[Attorneys for Petitioner James River Insurance Company]

Patrick Peter Fredette
McCormick Barstow et al LLP
PO Box 28912
Fresno, CA 93729-8912
[Attorney for Real Party in Interest Starr Indemnity & Liability Company]

John R. Landis Esq.
321 North Clark Street, Suite 2800
Chicago, IL 60654-5313

[Attorney for: Aon Insurance Services West, Inc.]

Via Regular U.S. Mail:

Ventura County Superior Court :
Hon. Vincent J. O'Neill, Jr.
800 S. Victoria Avenue, Dept. 41
Ventura, CA 93009