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Expert Analysis

Privilege and Insured-Insurer Communications

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The attorney-client privilege is one of the most well-recognized concepts of legal practice, with high-profile references to the doctrine appearing in movies, books, and news articles. On the surface, the boundaries of the attorney-client privilege appear relatively simple. The privilege serves as a shield to protect private communications concerning legal advice between a client and an attorney. In practice, the scope of the privilege and its application is not always so straightforward.

In the context of the insured-insurer relationship, disputes over the scope of the attorney-client privilege, and to a lesser extent the attorney work-product privilege, regularly arise in two scenarios. In the first scenario, an insurer seeks to require its insured to disclose communications exchanged between the insured and its counsel concerning a claim. In the second scenario, a third-party litigant seeks disclosure of privileged communications shared between an insured and an insurer, asserting that the insured waived the privilege when it disclosed the communications to the insurer.

While it may appear to be in the insured's best interest to provide all information concerning a claim to its insurer in furtherance of coverage, in certain circumstances, such disclosure may constitute a waiver of privilege. Consequently, before sharing privileged information with its insurer, it is important that the insured consider the scope of the applicable privilege and the risks of disclosure.

Insureds that look for guidance from the courts will find that, while New York courts have occasionally addressed these issues in the context of the insured-insurer relationship, there remain considerable gray areas. This column examines the issues that arise and attempts to draw some basic conclusions from the available case law.

Common Interest Doctrine

The attorney-client privilege traditionally protects communications between the client and the attorney for the purpose of obtaining legal advice. In general, the privilege is waived when communications are disclosed to parties outside of the attorney-client relationship.

New York courts that have examined the relationship between an insurer, its insured and the insured's defense counsel—sometimes called the "tripartite relationship"—have recognized the common interest doctrine. The common interest doctrine is not an independent privilege, but rather a limited exception to the general rule that disclosure of privileged communications to a third party waives the privilege.[1]

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The common interest doctrine, like the joint defense doctrine, protects communications between aligned parties that share an identical interest. In the context of communications between the insured and the insurer, the common interest doctrine may permit the insured to disclose communications with its attorney without involuntarily waiving the attorney-client privilege. The tricky issue for the insured is determining whether the common interest doctrine applies in a specific situation.

The answer appears to be fairly clear cut in hypotheticals at both ends of the spectrum. For example, where the insurer has denied coverage for a claim, it is evident that the insurer and the insured do not share a common interest, and therefore privileged communications shared with the insurer will not be protected by the common interest doctrine. In contrast, where an insurer has granted coverage for a claim without reservation, shared communications are protected. The most common example of this is where an insurer actually retains counsel to provide a defense for the insured, thus creating a common interest amongst the insured, defense counsel and the insurer.[2]

Where the insurer's position is less absolute, either because the insurer is still investigating a claim or because the insurer has issued a reservation of rights, the scope of protection is far less clear. In general, in these situations, it is best for the insured to exercise caution. In resolving disputes over whether there was a sufficient common interest, courts may look to the nature and purpose of the communications as well as the timing.[3]

Actions Brought by Insurer

Where an insurer who has not yet granted coverage for a claim seeks information concerning the claim, the insured should not disclose privileged communications with counsel without considering the risk that such disclosure will constitute a waiver of the attorney-client privilege. This should not prevent the insured from cooperating with the insurer by providing information to assist in the insurer's claim investigation. It simply means that the insured should limit the shared information to non-privileged information.

In *International Insurance v. Newmont Mining*,[4] in connection with a declaratory judgment action brought by the insurer, the plaintiff insurer sought discovery from the insured concerning two environmental actions that had been filed against the insured. The insured objected on the grounds that the materials were protected from disclosure by the attorney-client privilege. The insurer moved to compel disclosure, and the magistrate, finding that the common interest doctrine applied, compelled disclosure. The Southern District reversed the magistrate, holding that the common interest doctrine did not apply because the insurer had declined coverage and refused to defend the insured in the underlying actions.

In so ruling, the Southern District explained

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that the common interest doctrine applies "where an attorney actually represents both the insured and the insurer—joint representation—and accordingly both clients are working together with a single attorney toward a common goal."[5] In contrast, the court explained that the common interest doctrine did not apply merely because the insurer and the insured had the same "desire" to have "a successful defense" of the underlying actions.[6]

While the Southern District ruling represents a reasonable interpretation of the common interest doctrine, other courts have not uniformly barred an insurer who has yet to grant coverage from access to the insured's privileged communications. For example, in *Royal Indem. v. Salomon Smith Barney*,[7] the Supreme Court, New York County, ruled that the excess insurer was entitled to discovery of communications concerning the assessment of underlying claims exchanged between the insureds and the primary insurers to the extent those documents were prepared prior to the time that the excess carrier denied coverage. According to the trial court, those documents were subject to the common interest doctrine because the documents and communications were created in anticipation of minimizing exposure to liability for the underlying claims, something that was of common interest to both parties up until the point that the excess carrier officially disclaimed coverage.

Third Parties

Where a third party seeks discovery of privileged communications shared between an insured and its insurer, New York courts have addressed the applicability of the common interest doctrine on a case by case basis, depending on the facts presented. Three cases decided by the Southern District provided a good example of this case by case approach.

In *American Special Risk Insurance v. Greyhound Dial*,[8] defendants sought discovery of an insured party's communications with its insurer related to two lawsuits that the insurer had agreed to defend. Defendants acknowledged that certain communications between the insured and the insurer were protected by the attorney-client privilege, but contended that communications from the time period prior to the insurer's agreement to defend and communications regarding what portion of a proposed settlement the insurer was willing to pay should not be protected.

The Southern District denied the request for discovery, finding that all of the communications between the insured and the insurer were protected by the attorney-client privilege (and/or the work-product privilege), including those communications that took place prior to the insurer's agreement to defend and the communications concerning settlement contribution. In so holding, the Southern District appeared to take a broad view of the common interest doctrine, ruling that its scope included communications in which the insured disclosed facts to the insurer in furtherance of legal representation.[9]

In contrast, in *Aiena v. Olsen*,[10] the Southern District held that the discovery sought was not protected by the attorney-client privilege because the insurer had denied coverage for the claim, evidencing the lack of a common interest. In *Aiena*, plaintiffs sought discovery of communications between counsel for the defendants and counsel for the defendants' insurer. The defendants claimed that the communications were protected by the attorney-client privilege, relying on the discussion set forth in *American Special Risk*. According to the court, unlike the communications in that case, the communications at issue were not in furtherance of legal representation, but instead concerned whether the claims were covered and included aggressive advocacy by counsel for both the insured and the insurer, in anticipation of coverage litigation. Consequently, the court held that the communications were not protected from disclosure by any common interest.

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Finally, in *Kingsway Financial Services v. Pricewaterhouse-Coopers*,[11] the Southern District focused on the timing of the communications. Although the insured and the insurer were currently adverse, the court held that prior communications between the insured and the insurer, made at a time when the insurer and the insured did share a common interest regarding the underlying action, were protected by the common interest doctrine and not subject to disclosure.[12]

Work-Product Doctrine

The attorney work-product privilege protects against disclosure of documents prepared in anticipation of litigation by a party or its representative.[13] While disputes over the scope of the common interest doctrine typically focus on attorney-client communications, often the discovery sought also includes documents that may be subject to the attorney work-product privilege.

For example, in *American Special Risk*, discussed above, the court held that communications concerning the amount that an insurer would contribute to the settlement of an insured claim were protected by the work-product doctrine because the documents contained lawyer assessments of the validity of the underlying claims.[14]

In *Kingsway Financial Services*, examining this issue, the court explained that the work-product privilege is only "waived by disclosure to a party outside the privileged relationship."[15] Therefore, disclosure of work-product materials to those having joint interests, including an insurer with a common interest, does not waive the work-product privilege.[16]

Looking Forward

In the context of insured-insurer communications, the outer confines of the common interest doctrine appear fairly clear. Certainly, where the insurer has denied coverage, communications between the insured and insurer are unlikely to be protected. Similarly, communications concerning disputed coverage issues are also unlikely to be protected. In contrast, where the insurer has agreed to defend the insured and has retained counsel to do so, courts are likely to find that a common interest privilege protects their communications.

Based on published case law, it appears that other scenarios will be addressed on a case-by-case basis, with courts considering the nature, timing and purpose of the communications. Until the courts articulate a more well-defined methodology for determining when a common interest will be deemed to protect communications, insureds would be wise to demonstrate caution and be conservative in determining whether to share privileged communications with their insurers.

1. *Kingsway Fin. Servs. v. PricewaterhouseCoopers*, 2008 WL 4452134 (S.D.N.Y. Oct. 2, 2008).
2. *North River Insurance v. Columbia Casualty*, 1995 WL 5792 (S.D.N.Y. Jan. 5, 1995).
3. Id.
4. *International Insurance v. Newmont Mining*, 800 F.Supp. 1195 (S.D.N.Y. 1992).
5. Id.
6. Id.
7. *Royal Indemnity v. Salomon Smith Barney*, 4 Misc.3d 1006(A), 2004 WL 1563259 (Sup. Ct. N.Y. County, June 19, 2004).
8. *American Special Risk Ins. v. Greyhound Dial*, 1995 WL 442151 (S.D.N.Y. July 26, 1995).
9. Id.
10. *Aiena v. Olsen*, 194 F.R.D. 134 (S.D.N.Y. 2000).
11. *Kingsway*, 2008 WL 4452134 .
12. Id.
13. Id.
14. *American Special Risk*, 1995 WL 442151 (S.D.N.Y. July 26, 1995).
15. *Kingsway*, 2008 WL 4452134; *In re Pfizer Securities Litigation*, 1993 WL 561125 (S.D.N.Y. 1993).
16. Id.

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