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## Insurance Counsel and the Attorney-Client Privilege: Who Is the Client?

When an insurance company selects and pays a lawyer to defend an insured policyholder, whom does the lawyer represent?

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When an insurance company selects and pays a lawyer to defend an insured policyholder, whom does the lawyer represent? Does the lawyer represent only the insured, or does the lawyer represent both the insured and the insurer? And what happens to the attorney-client privilege when the insured or the lawyer communicates otherwise privileged information to the insurance company in order to keep the insurer apprised of the status of the case?

In *Camico Mutual Insurance v. Heffler, Radetich & Saitta*, C.A. No. 11-4753 (E.D. Pa. Jan. 28, 2013), the U.S. District Court for the Eastern District of Pennsylvania recently concluded that, under Pennsylvania law, there is no “absolute rule” that treats the insured and the insurer as a “single client” of the lawyer appointed by the insurer to represent the insured. Instead, the facts of each case will control if the lawyer is engaged in a joint representation or only represents the insured. Under either scenario, all three entities — insured, insurer and counsel — should be cognizant of if and how the attorney-client privilege will apply to their communications.

Heffler, Radetich & Saitta, the insured, independently hired a law firm, Conrad O’Brien, to defend Heffler against a claim of misconduct. While reserving its rights, Camico Mutual Insurance Co., Heffler’s insurer, assumed the responsibility for paying Conrad O’Brien’s fees from the underlying action. However, Camico brought a declaratory judgment action against Heffler, claiming that Camico’s coverage obligation was limited to \$100,000.

In discovery in the declaratory judgment action, Camico sought production of documents from Heffler. Heffler refused to produce certain of its communications with Conrad O’Brien related to the underlying action, invoking the attorney-client privilege. Camico moved to compel, arguing that it was entitled to the

otherwise privileged documents because it “shared a common interest” with Heffler regarding the underlying action, the opinion said.

The court began its analysis by noting that it did not have the benefit of any guidance from the Pennsylvania Supreme Court on the issue. Consequently, the court turned to other authorities in order to predict if the Pennsylvania Supreme Court would permit Camico access to Heffler’s privileged communications with Conrad O’Brien.

The court noted that Camico’s invocation of the “common interest” doctrine was a misnomer. The common interest doctrine applies when two (or more) clients, each represented by its own separate counsel, share information related to a matter of common interest to the parties. In those circumstances, the sharing of confidential information does not amount to a waiver of the privilege.

The court observed that the concept at issue in *Camico* was not the common interest doctrine, but was instead the co-client or joint client privilege. The co-client privilege is applicable when one lawyer represents multiple parties with regard to a particular matter. Having properly framed the issue, the court then analyzed whether the co-client privilege applied in *Camico*. If it did, Camico likely would have been entitled to access to Heffler’s communications with Conrad O’Brien. Despite a rather robust division of authorities on the question, the court rejected the proposition that Pennsylvania has an “absolute rule” that, in all instances, an insured and its insurer are co-clients of a lawyer retained (or paid by) the insurer to represent the insured. Relying on decisions from the U.S. Court of Appeals for the Third Circuit and the Pennsylvania Superior Court, and the *Restatement (Third) of the Law Governing Lawyers*, the court held that whether an insured and insurer were co-clients depended on the facts of each particular case.

The court then examined whether, in the case at hand, Heffler and Camico were co-clients of Conrad O’Brien regarding the underlying action. Heffler presented the court with evidence that no co-client relationship existed: Heffler independently retained Conrad O’Brien; Conrad O’Brien submitted an affidavit denying any attorney-client relationship with Camico; and a letter from Camico referred to Conrad O’Brien as “independent counsel.”

Camico contended that a co-client relationship existed. It claimed that it “participated in the defense” of the underlying action and that Conrad O’Brien was to provide Camico with information regarding the case, the opinion said. However, Camico submitted no evidence to support its assertions.

Based on the evidence Heffler submitted and the absence of evidence from Camico, the court concluded that no co-client relationship existed. The court also rejected Camico’s argument that its “shared interest” in the outcome of the underlying action and was sufficient to permit Camico to pierce the privilege. Accordingly, the court denied Camico’s motion and held that the privilege protected Heffler’s communications with Conrad O’Brien.

The lessons from *Camico* are:

- Pennsylvania law is unsettled on the question of whether insured and insurer will be treated as a “single client” of an attorney appointed by the insurer to defend an insured.
- If insured and insurer are joint clients of the lawyer, the insured should be aware that its communications with counsel may not be privileged vis-à-vis the insurer.
- If insured and insurer are not joint clients, then, at least initially, the insured’s communications with counsel should be privileged vis-à-vis the insurer. However, if counsel or the insured voluntarily share otherwise privileged communications with the insurer, there is a significant risk that the privilege would be waived, not just to the insurer, but potentially to other parties.
- Attorney-client privilege disputes now frequently turn in favor of the party who offers competent evidence through affidavits or even live testimony to support its position. The days of merely relying on argument or

representations from counsel are receding. If an attorney-client privilege issue is worth fighting about, it is worth the effort of supplying the court with competent evidence in support of your position.

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