PRIVILEGE, THE COMMON INTEREST EXCEPTION AND

THE REINSURANCE RELATIONSHIP (Revisted)

By

Robert M. Hall

Mr. Hall is an attorney, a former law firm partner, a former insurance and reinsurance executive and acts as an insurance consultant as well as an arbitrator of insurance and reinsurance disputes and as an expert witness. He is a veteran of over170 arbitration panels and is certified as an arbitrator and umpire by ARIAS - US. The views expressed in this article are those of the author and do not reflect the views of his clients. *Mr. Hall has authored over 100 articles and they may be viewed at his website: robertmhall.com.*

I. Introduction

Issues related to privileged communications can be complex, particularly for non-lawyers, since there are many exceptions to privilege rules and exceptions to those exceptions. Typically, communications between an attorney and a client which are otherwise privileged lose their privilege when communicated to a third party. However, the privilege is not lost when the third party is one with a "common interest" with the communicating party. One court characterized this "[a]s a community of interest . . . among different persons or separate corporations where they have an identical legal interest with respect to the subject matter of a communication between an attorney and a client concerning legal advice."[1]

The purpose of this article is to examine selected case law as to how the common interest doctrine is applied when discovery is sought by or from a reinsurer. The case law is broken out into two parts which appear to have a significant impact on the outcome of the effort: 1. common interest as a shield – common interest between a cedent and reinsurer when discovery is sought by a third party from the reinsurer; and 2. common interest as a sword – reinsurer using common interest in an effort to obtain discovery from a cedent.

II. Common Interest as a Shield

Durham Indus. v. North River Ins. Co., 1980 U.S. Dist. Lexis 15154 (S.D.N.Y.) was a suit over a bond by an insured against the insurer seeking coverage on a claim. The insured[2] sought letters from the insurer's former attorneys that the court ruled were privileged. The insurer supplied these letters to its reinsurers that were not represented by the attorneys. When the insured sought the same documents

from the reinsurers, the cedent resisted claiming a common interest with the reinsurers. The court ruled that the letters remained privileged in the possession of the reinsurers: "Here, where the reinsurers bear a percentage of liability on the bond, their interest is clearly identical to that of the defendant. The fact that the reinsurers were not represented by the [law] firm does not affect this result."[3]

The insured sought documents which qualified for a work product privilege but which had been provided to the reinsurer through a reinsurance intermediary in *Minnesota Sch. Bds. Ass'n Ins. Trust v. Employers Ins. Co.,* 183 F.R.D. 627 (N.D. Ill. 1999). The court found the insurer had a common interest both with the intermediary and the reinsurer since the insurer "always intended and expected that their communications would remain confidential and protected from common adversaries such as [the insured]."[4] This case was followed by *Am. Safety Cas. Ins. Co. v. City of Waukegan,* 2011 U.S. Dist. Lexis 4854 (N.D.Ill.)

Allendale Mut. Ins. Co. v. Bull Data Sys., 152 F.R.D. 132 (N.D.Ill. 1993) is another case in which an insured in coverage litigation with its insurer sought documents from the files of two reinsurers. Claims representatives of the cedent and its reinsurers exchanged letters concerning the adjustment of the claim and the coverage litigation. The insured sought such correspondence plus any internal documents on point created by the reinsurers. The cedent claimed attorney-client and work product privileges which were not waived due to the common interest doctrine. After a detailed review of the documents in question, the court affirmed the common interest doctrine but concluded that it did not apply since the documents in question did not qualify for either work product or attorney-client privilege:

> In the present case *not one* of the documents in the possession of [the reinsurers], and allegedly protected by the work product privilege, were prepared in anticipation of future litigation. Each document seems to have been created as part of the ordinary course of business between the insurer and its reinsurers. It is the very nature of an insurer's business to investigate and evaluate the claims of its insureds, and the fact that the investigation and evaluation continues after litigation commences is not conclusive proof that material has been created to aid in that litigation. Moreover, [the cedent] was contractually obligated to continually notify its reinsurers of the status of [the insured's] claim and such notifications do not qualify as work product of an attorney or agent of [the cedent] prepared in anticipation of litigation.[5]

> We find that none of the documents which [the cedent and the reinsurers] claim are protected are in fact covered by the attorney-client privilege. To begin with, *not one* of the documents was either created by a lawyer, or was created by an employee of one of the companies and sent to a lawyer. . . . [T]he documents here appear to have been generated in the ordinary course of business of the insurer and its reinsurers, and none of them seem to be for the purpose of seeking advice from legal professionals acting in that capacity.[6]

See also, Regence Group v. TIG Specialty Ins. Co., 2010 U.S. Dist. Lexis 9840 (D. Ore) in which the court declined a motion to reconsider a ruling that certain documents exchanged between an insurer and its reinsurer were not privileged and, therefore, did not qualify for the common interest doctrine.

On the basis of common interest, the cedent redacted certain portions of the reinsurance documents that the court ordered the cedent to supply to the insured in *Progressive Cas. Ins. Co. v. FDIC,* 302 F.R.D. 497 (N.D. Iowa 2014). The court declined to allow the redactions finding that the relationship between the cedent and reinsurer was a commercial rather than the required legal relationship:

> Even assuming Iowa recognizes the common interest doctrine, I find that [the cedent] failed to establish that it applies here. . . . [T]he doctrine only applies when the parties share a common legal interest. The relationship between [the cedent] and its reinsurers and broker is commercial and financial in nature, not legal. The information [the cedent] disclosed was in furtherance of its business relationship with the reinsurers and broker. The sole purpose of disclosure was to obtain or maintain reinsurance policies to cover [the cedent's] insurance risks. This is, of course, the commercial nature of the reinsurance industry.
> . . . .
> In this case, [the cedent] has not shown that its reinsurers are actively participating in [the cedent's] litigation and legal defense or that they have any obligation to do so. There is no evidence establishing a joint strategy or legal enterprise, which is central to common interest doctrine. The argument that "if [the cedent] loses, so do its reinsurers" does not come close to establishing that the common interest doctrine applies (assuming, again, that Iowa law even recognizes that doctrine.[7]

The court reached similar conclusions in *Fireman's Fund Ins. Co. v. Great Am. Ins. Co.,* 284 F.R.D. 132 (S.D. N.Y. 2012). The reinsurer was a passive participant in the dispute between the insured and the cedent and, in fact, turned over to its cedent the reinsurer's file on the loss. "[The cedent] has not proven, or even argued, that it disclosed otherwise privileged material to [the reinsurer] 'in the course

of formulating a common legal strategy' or 'for the purposes of obtaining legal advice from' [the reinsurer] . . . .[8]

III. Common Interest as a Sword

It is not usual for a reinsurer to seek documents from an attorney hired by the insurer for underlying litigation for use in a dispute between the insurer and reinsurer. One such case is *North River Ins. Co. v. Philadelphia Re Corp. and Cigna Reins. Co.*, 797 F.Supp. 363 (D.NJ 1992) in which the reinsurer was seeking documents from the cedent concerning certain decisions made with respect to an arbitration with [the cedent's] insured. The court ruled that no common interest exception existed:

> The common interest doctrine has been recognized in the insured/insurer context when counsel has been retained or paid by the insurer, and allows either party to obtain attorney-client communications related to the underlying facts giving rise to the claim, because the interests of the insured and insurer in defeating the third-party claim against the insured are so close that "no reasonable expectations of confidentiality" is said to exist. . . .
>
> The relationship between [the reinsurer] and [the cedent] does not fall within the confines of the classic common interest doctrine, because [the cedent] retained its own counsel wholly independent from [the reinsurer], and [the reinsurer] had no input in any respect into the relationship between [the cedent] and its counsel, nor otherwise controlled that relationship.[9]

The North River court went on to criticize *Waste Management, infra,* on the basis that "the common interest doctrine is completely unlashed from its moorings in traditional privilege law . . ."[10]

Travelers Cas. & Surety Co. v. Century Indem. Co., 2011 U.S. Dist. Lexis 132131 (D. Conn) is a case in which the reinsurer sought documents from the cedent on its decision to package all losses as one occurrence under the treaty. The court rejected the argument that there was a common interest exception noting that "[the cedent] retained separate counsel wholly independent of [the reinsurer], [the reinsurer] has no input into the relationship between [the cedent] and its counsel, and where the parties are clearly adverse to one another."[11]

Reinsurers were seeking documents from the cedent concerning the settlement of massive asbestos-related claims in *American Re-Ins. Co. v. United States Fidelity & Guaranty Co.* 2007 N.Y. App. Lexis 6514. The court rejected the application of the common interest exception to privilege holding:

> [T]he relationship between an insurer and reinsurer stands in stark contrast to a relationship between an insurer and insured. To begin with, an insurer is obligated to defend the insured, whereas a reinsurer has no such duty. Moreover, the parties' interests in the present action are indisputably adverse, and the mere fact that they shared an interest in the eventual outcome of the underlying litigation is not sufficient to create a common interest so as to defeat [the cedent's] claimed privileges. [12]

In *United States Fire Ins. Co v. Phoenix Assurance Co. of N.Y.,* 1992 N.Y. Misc. LEXIS 799, the reinsurer argued that the cedent provided privileged communications while the cedent was resisting the claim of the insured and that this waived privileges as to later communications on the same topic when the cedent and reinsurer became adverse. The court disagreed:

> [The cedent's] disclosure of certain coverage counsel correspondence to [the reinsurer] did function as a waiver because of their shared interest in the outcome of the [underlying] dispute. It was not meant to begin a pattern of granting a third party access to attorney-client communications, but simply to apprise [the reinsurer] of the status of the [underlying] litigation. [13]

While it is a dispute between an insured and insurer, not involving reinsurance, a case representing an expansive view of common interest is *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 579 N.E.2d 322 (Ill. 1991). The environmental liability policy at issue did not require the insurer to provide a defense and the insured retained its own attorney to handle claims. The insurer sought files from the insured's attorney under the cooperation clause of the policy and on the basis of the common interest exception to privilege.

The insured argued that the common interest did not apply since the insurer provided no defense and did not participate in the underlying litigation. The court rejected this argument ruling: "[The common interest] doctrine may properly be applied where the attorney, although neither retained by nor in direct communication with the insurer, acts for the mutual benefit of both the insured and the insurer."[14] The court went on to observe:

> In sum, insurers' entitlement to production of the files arises out of the contractual obligations and the common interest doctrine. Their right to complete disclosure is not only necessary to a proper resolution of the pending lawsuit, but exists irrespective of the now adversarial nature of the parties' relationship. The attorney-client privilege has no application in this case. [15]

IV. Commentary

Case law suggests that the common interest doctrine will act as a shield to protect privileged documents exchanged between a cedent and a reinsurer if they are exchanged in anticipation of litigation (particularly if the reinsurer is actively involved in the litigation) and not in the ordinary course of business in adjusting and paying claims. Case law also suggests that common interest cannot be used as a sword by a reinsurer to obtain documents exchanged between a cedent and its counsel. While *Waste Management, Inc., supra,* suggests a much more liberal use of common interest as a sword, this case appears to be an outlier, which has questionable application to reinsurer-cedent relationship.

ENDNOTES

[1] 1980 U.S. Dist. LEXIS 15154 (S.D.N.Y.) *6 quoting *DuPlan Corp. v. Deering Milliken, Inc.,* 397 F.Supp. 1146, 1172 (D.S.C. 1974).

[2] While the terms "insured" and "insurer" are not strictly accurate in the surety context, they are used here to avoid confusion for the uninitiated.

[3] 1980 U.S. Dist. LEXIS 15154 (S.D.N.Y.) *6.

[4] 183 F.R.D. 627, 632.

[5] 152 F.R.D. 132, 136 (N.D.Ill. 1993). Emphasis in the original, internal citations omitted.

[6] *Id.* at 137.

[7] 302 F.R.D. 497, 502-3 (N.D. IA 2014).

[8] 284 F.R.D. 132, 141.

[9] 797 F.Supp. 363, 367 (internal citations omitted).

[10] *Id.*

[11] 2011 U.S. Dist. 132131 *5-6.

[12] 2007 N.Y. App. Div. LEXI 6514 *5.

[13] 1992 N.Y. Misc. LEXIS 799 *7-8(1992).

[14] 579 N.E.2d 322, 329.

[15] *Id.*