IS IT STILL PRIVILEGED? AN INSURER'S DISCLOSURE OF INFORMATION TO ITS REINSURERS AND BROKERS WAIVES PRIVILEGE … SOMETIMES.

By: K. Renee Schimkat

A federal district court recently held that an insurer waived any claim of attorney-client or work product privilege when it disclosed otherwise potentially privileged information to its reinsurers and to its broker. In doing so, the court rejected application of the common interest doctrine to the communications at issue. That doctrine serves as an exception to the general rule that voluntary disclosure of privileged information to a third party waives applicable privileges.

***Progressive Casualty* – Privilege Waived**

In *Progressive Casualty Ins. Co. v. Federal Deposit Insurance Corp., as Receiver of Vantus Bank, et al.*, Case No. 12-CV-04041 (N.D. Iowa Oct. 3, 2014), the court had previously compelled Progressive to produce certain information in connection with the FDIC's claims against the insured bank's former directors and officers. That information included Progressive's communications with its reinsurers regarding coverage for the FDIC's claims and provisions of the bank's insurance policy. Progressive produced the information, but redacted portions on the grounds of attorney-client privilege and/or protected work product.

The FDIC argued that the information communicated to Progressive's reinsurers was created in the ordinary course of business and therefore not covered by the work product doctrine. The FDIC further argued that Progressive waived any privilege, work product or attorney-client, when it voluntarily disclosed documents containing that information to its reinsurers and reinsurance broker.

Progressive contended that both the work product and attorney-client privileges covered the legal advice and analysis contained in the information and that its voluntary disclosure of that information to its reinsurer and broker did not constitute a waiver. Progressive cited to the common interest doctrine to preserve these privileges.

The court rejected application of the common interest doctrine and held that Progressive had waived all applicable privileges when it disclosed documents containing privileged information to its reinsurers and broker. [1] The core of the court's decision was the fact that Progressive could not demonstrate anything other than a standard business relationship between it, its reinsurers, and its broker. That business relationship, without more, did not invoke the common interest privilege:

[T]he doctrine applies only when the parties share a common legal interest. The relationship between Progressive and its reinsurers and broker is commercial and financial in nature, not legal. The information Progressive 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 Progressive's insurance risks. That is, of course, the commercial nature of the reinsurance industry.

Progressive has not shown that the privileged information contained in the documents at issue was disclosed in order to build a legal defense or strategy for litigation. While Progressive contends that the reinsurers' interests are aligned with its own because the reinsurers and Progressive would face liability for loss if Progressive is ultimately ordered to pay proceeds under the Vantus Policy, that fact is the basis of the reinsurance industry and, indeed, the sole purpose of reinsurance. The unique circumstances of the reinsurance business do not automatically give rise to a common legal interest.

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The argument that `if Progressive loses, so do its reinsurers' does not come close to establishing that the common interest doctrine applies … (Order at pp. 14-15) (emphasis in original).

The "common legal interest" on which Progressive relied was the "express authorization in the reinsurance agreements for the reinsurers to participate with Progressive in the defense of any claim, loss, or legal proceeding likely to involve the

[1] The district court's October 3rd decision affirmed the Magistrate Judge's Order of August 22, 2014, in all respects and rejected each of Progressive's objections to that Order.

reinsurer." (Order at p. 16) This, the court found, was not enough to invoke the common interest privilege:

Progressive and its reinsurers do not have a common legal interest merely because the reinsurers may have an obligation to pay Progressive's losses … Progressive … fail[s] to establish that an agreement between it and its reinsurers established a `cooperative and common enterprise towards an identical legal strategy.' A contractual authorization for the reinsurers to participate in litigation with Progressive falls well short of evidence satisfying that requirement. (Order at p. 21) (internal citations omitted) (emphasis in original).

Though the court rejected application of the common interest doctrine by focusing on the pure business nature of the relationship between these three parties, the very nature of that tri-parte relationship is at the core of other, previous decisions where courts have found that similar disclosures do not waive an applicable privilege.

Other Decisions – Privilege Preserved

In *U.S. Fire Ins. Co. v. General Reinsurance*, 1989 WL 82415 (S.D.N.Y. July 20, 1989), for example, General Re, as an excess insurer, sought production of an unredacted internal memorandum that U.S. Fire had prepared and produced in discovery, but with a portion excised on the grounds of attorney-client and work product privilege because "it constitutes U.S. Fire's internal digest of advice received from [counsel] and refers explicitly to such." *Id.* at *1.

U.S. Fire had furnished an unredacted copy of the internal memorandum to a broker that had placed U.S. Fire's reinsurance policy. General Re argued the memorandum was not privileged and, even if it was, any privilege was waived by U.S. Fire's production to its reinsurance broker.

The court rejected both arguments. The court found that the documents in question contained privileged work product and that the production of those documents did not constitute a waiver. The court focused on the relationship between the insurer, its reinsurer, and its broker, and found an expectation of secrecy among these parties that preserved the privilege:

In the reinsurance context, a broker/intermediary's role is to bridge the information gap between ceding office and reinsurer. Communications to one's insurer made as a consequence of pending litigation are privileged work product. Since the broker/intermediary is merely a conduit for the relay of correspondence to U.S. Fire's reinsurers, disclosure of privileged information to the broker/intermediary is consistent `with the purpose of maintaining the secrecy of [privileged] information from current or potential adversaries.'

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There can be little doubt that U.S. Fire's reinsurers and the broker/intermediary which served as a conduit between U.S. Fire and its reinsurers were and remain in a community of interest regarding this lawsuit. As such, shared communications among these entities retain their privileged status under the work product doctrine. *Id.* at *3 (internal citations omitted).

In *American Safety Cas. Ins. Co. v. City of Waukegan, Illinois*, 2011 WL 180561 (N.D. Ill. Jan. 19, 2011), the court similarly recognized that a privilege by an insurer is waived only when the insurer's disclosure of confidential information to a third party "is inconsistent with the maintenance of secrecy from the disclosing party's adversary." *Id.* at *2 (quoting, *Minnesota School Boards Assoc. Ins. Trust v. Employers Ins. Co. of Wausau*, 183 F.R.D. 627, 631-32 (N.D. Ill. 1999)). There, the insurer disclosed the document in question to its reinsurers -- a disclosure the court found was "not inconsistent" with maintaining secrecy. The court therefore denied a motion to compel the production of documents on the grounds of waiver. 2011 WL 180561, at *2.

In *Minnesota School Boards*, the court also agreed with the insurer that disclosure of documents to its reinsurer and broker did not waive the work product privilege because the insurer "always intended and expected that their communications would remain confidential and protected from common adversaries such as MSBAIT." 183 F.R.D. at 632. The court was not persuaded by the argument that the common interest doctrine did not apply because the communications were made to a broker rather than to the reinsurers themselves. The "disclosure of work product to a reinsurance broker does not waive the work product privilege any more than would

disclosure of work product to an actual reinsurer." *Id.* at 631. *See also American Safety*, 2011 WL 180561, at *2 n.1 (rejecting the same argument and finding that the insurer did not waive the privilege by communicating to its reinsurer through its broker).

Takeaway – Disclosure Waives Privilege, Sometimes

The holding in *Progressive Casualty* is the most recent on the issue of whether the common interest doctrine can preserve an applicable privilege to information disclosed by an insurer to its reinsurer and broker or whether such disclosure amounts to a waiver. The decision certainly exemplifies why some courts have rejected application of the common interest doctrine to the disclosure of information by an insurer to its reinsurer and broker, that is, the lack of a common legal interest between them, as opposed to solely a business one. *See e.g. Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 152 F.R.D. 132, 141 (N.D. Ill. 1993) (rejecting the common interest doctrine because the communications at issue were made by the insurer to its reinsurer in the ordinary course of business while processing an insurance claim and, therefore, "neither party could have a legal interest in the information").

The decision does not, however, reveal the importance other courts have placed on the relationship between an insurer, its reinsurer, and its broker. It is that relationship that leads some courts to find the parties' interests are so aligned that the insurer must have surely and reasonably expected to maintain the confidentiality of information when it disclosed that information to these parties.[2] To some courts, that expectation preserves a privilege.

Of course, the mere expectation of confidentiality alone does not create a privilege. Even if parties "believed" their communications were privileged, without more, "that would not make them so." *SR International Business Ins. Co. Ltd. v. World*

[2] Where a shared interest is not present between these parties, however, an insurer can waive a privilege by disclosing otherwise privileged documents to its reinsurer. *See e.g. The Regence Group v. TIG Specialty Insurance Co.*, Case No. 3:07-CV-01337 (D. Or. May 1, 2009) (rejecting the common interest doctrine where the insurer shared its counsel's documents with a reinsurer when the parties' interests were not only "not aligned," but were adversarial) (citing, *AIU Insurance Co. v. TIG Ins. Co.*, 2008 WL 5062030, at *7 (S.D.N.Y. Nov. 25, 2008)).

Trade Center Properties LLC, 2002 WL 1334821, at *3 n. 1 (S.D.N.Y. June 19, 2002) (rejecting the common interest privilege to post-9/11 communications between the insured and its broker).

That being said, the mere disclosure of information alone does not create a waiver.

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This article reflects the views of the author, and does not constitute legal or other professional advice or service by Carlton Fields Jorden Burt, PA and/or any of its attorneys.

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