

Attorney-Client and Work-Product Privileges Not Waived by Disclosure to Insurer

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The United States District Court for the Southern District of New York has held that an insured did not waive the attorney-client privilege or the work-product privilege by sharing protected materials with its insurer. *Kingsway Fin. Servs., Inc. v. Pricewaterhouse-Coopers LLP*, 2008 WL 4452134 (S.D.N.Y. Oct. 2, 2008).

The insurer had issued a directors and officers liability policy to a financial services company. Under the policy, it was the obligation of the insureds, and not the insurer, to defend any claim against them. The insureds, however, were required to seek the insurer's consent before incurring defense costs or entering into any settlement. The policy required the insureds "to provide the [insurer] with all information and particulars it may reasonably request in order to reach a decision as to such consent." The policy also specified that the insurer had the right to associate with the insureds in the defense and settlement of any claim.

The underlying action initially involved a number of individual defendants on whose behalf the insurer had been advancing defense costs. After all but one of those defendants reached settlements with the plaintiffs, the insurer initiated a separate interpleader action to resolve the competing demands of the insureds to the remaining limit of liability of the policy. While this separate action was pending, the plaintiffs in the underlying action served a subpoena *duces tecum* on the insurer demanding the production of all documents that it had sent to or received from the insureds and/or their counsel, as well as the insurer's entire claim file relating to the matter. The remaining defendant moved to quash the subpoena on several grounds, including that certain materials sought from the insurer were privileged. In response, the plaintiffs argued that any privilege had been waived by disclosure to the insurer. The court disagreed.

As an initial matter, the court noted that courts in the Second Circuit recognize the "common interest rule." The court explained that this rule provides "a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party outside the attorney-client relationship." In this case, the court found that the insured and the insurer had a common interest with respect to the underlying action. According to the court, this finding was supported by the insurer's rights and obligations under the policy with respect to the defense of the case, including the obligation to advance defense costs.

The court rejected the notion that any common interest between the insured and the insurer was destroyed by the fact that they were adverse in the interpleader action. In this connection, the court noted that whether the attorney-client privilege extends to information communicated to the insurer depends on the nature of the information and the purpose for which it was communicated. To the extent that information was provided by the insured to the insurer in furtherance of their "joint defense," the information would remain privileged because the insured and the insurer had a common interest in successfully defending or settling the underlying litigation. On the other hand, information relating to the parties' ongoing coverage dispute would not be privileged.

Next, the court addressed the work-product privilege and its application to reports in the insurer's files that contained defense counsel's analyses of the underlying action, including counsel's mental impressions, legal strategy and recommendations for proceeding. The court observed that this privilege serves a different purpose than the attorney-client privilege. According to the court, the latter is intended to encourage full disclosure by the client, while the work-product privilege "is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." In this connection, the court recognized that the protection afforded to work-product is waived only "when the disclosure is to an adversary or materially increases the likelihood of disclosure to an adversary." Because that was not the case here, the court concluded that the privilege applied to preclude disclosure of protected materials in the insurer's files.